IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 381

MURIEL F. McCARTY,

Plaintiff-Petitioner,

vs.

R. R. NELSON, Administrator of the Estate of Albie C. Sansbury, and MARGUERIETTE H. DeKARLO,

Defendants-Respondents.

RAY FRANKLIN BUSHAW,

Plaintiff-Petitioner,

vs.

R. R. NELSON, Administrator of the Estate of Albie C. Sansbury, and MARGUERIETTE H. DeKARLO,

Defendants-Respondents.

MARVEL SANSBURY, by MURIEL F. McCARTY, Guardian Ad Litem,

Plaintiff-Petitioner,

vs.

R. R. NELSON, Administrator of the Estate of Albie C. Sansbury, and MARGUERIETTE H. DeKARLO,

Defendants-Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA

AND BRIEF IN SUPPORT THEREOF

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PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Comes now Muriel F. McCarty, Ray Franklin Bushaw and Marvel Sansbury, by Muriel F. McCarty, guardian ad litem, the above named petitioners, and respectfully petition this Honorable Court to grant Writ of Certiorari to review

the decision and judgment of the Supreme Court of Minnesota, the highest court in said State, rendered and entered finally May 17, 1951, in the cases lately pending in said Supreme Court of Minnesota styled:

Muriel F. McCarty, Plaintiff-Respondent, vs. R. R. Nelson, Administrator of the Estate of Albie C. Sansbury, and Margueriette H. DeKarlo, Defendants-Appellants;

Ray Franklin Bushaw, Plaintiff-Respondent, vs. R. R. Nelson, Administrator of the Estate of Albie C. Sansbury, and Margueriette H. DeKarlo, Defendants-Appellants;

Marvel Sansbury by Muriel F. McCarty, Guardian ad Litem, vs. R. R. Nelson, Administrator of the Estate of Albie C. Sansbury, and Margueriette H. DeKarlo, Defendants-Appellants;

although three separate judgments were entered in the trial court one notice of appeal was allowed which was numbered 35287 of causes on the docket of said Supreme Court of Minnesota reversing the decrees in favor of each of the petitioners in the trial court, District Court of Hennepin County, Minnesota, by the rendition of one opinion, which opinion was originally made and filed March 16, 1951, but thereafter a petition for re-argument and re-hearing was duly made, filed by respondents therein and petitioners herein, the principle question in said petition being that the decision of March 16, 1951, infringed upon petitioners' rights guaranteed them under the due process of law and equal protection of the law clause of the Fourteenth Amendment of the Constitution of the United States. The highest state court of Minnesota, the Supreme Court of said State, denied said petition without opinion May 17, 1951, making said decision final on said date.

The aforesaid Decision is recorded in 47 N. W. (2d) 595, 233 Minn. .....

NATURE OF CASES AND SUMMARY STATEMENT OF THE MATTER INVOLVED

Each of the petitioners instituted an action in the Hennepin County District Court, State of Minnesota, for the specific performance of an oral agreement entered into on or about the time that their mother, Alice Hierlmier, married Albie C. Sansbury on October 20th, 1907, at Minneapolis, Minnesota, whereby Albie C. Sansbury on one side, agreed with Alice Hierlmier and the petitioners on the other side, to take and make the petitioners his children and to become their father, and thereupon petitioners became members of the household of Albie C. Sansbury and were considered by him as his children, which relationship continued until the petitioners married or reached their majority and the relationship of parent and child by speech and conduct continued until the death of Albie C. Sansbury. Each of the petitioners' complaints are similar and a few paragraphs of the complaint of petitioner Muriel F. McCarty allege the following:

> "IV. That immediately after the marrriage of Albie C. Sansbuy to their mother on August 20, 1907, the plaintiff and her aforesaid brother and her aforesaid sister and said Albie C. Sansbury and his wife, Alice Ames Sansbury, contracted orally by and between each other in fact and substance as follows:
>
> "That if plaintiff and her said brother and her said sister would live in the house and home of Albie C. Sansbury and his said wife and live with them and give them their services as they should be directed until they had become of age or married, that in consideration thereof, at their death said Albie C. Sansbury and his said wife would give and leave to the plaintiff and to each of her said sister and her said brother a full child's proportionate share as if they had been born unto them, of all the property, both real and personal, which they own and which they might own at the time of their death.
>
> "V. That, relying upon the aforesaid promise and

agreement and pursuant to said contract as aforesaid, the plaintiff lived at the house and home of, and with Albie C. Sansbury and his wife, Alice Ames Sansbury, and gave them her services as requested daily and continually until she was married October 15, 1911.

"VI. That the services so rendered by the plaintiff as aforesaid cannot be enumerated specifically but said services consisted of housework of every kind and character, all work in and about the house of every nature required in housekeeping and in running and maintaining a home, of serving, washing, ironing, and much other and different kinds of work done and performed outside of the dwelling house has been done in many different ways as requested by said Albie C. Sansbury and his said wife. That said services included the caring for and nursing of said Albie C. Sansbury and his said wife when ill.

"VII. That during said time as aforesaid, a strong affection existed between said Albie C. Sansbury and his said wife and the plaintiff and her said sister and said brother, and the labor and services as aforesaid and the relationship herein described were daily and continuous until the plaintiff was married as hereinbefore alleged. That the aforesaid affection continued to exist until the demise of Albie C. Sansbury, April 28, 1948.

"VIIa. That plaintiff under and pursuant to aforesaid agreement assumed a peculiar and domestic relation to decedent Albie C. Sansbury as a member of his family; and conducted herself towards him as a dutiful daughter and obeyed and faithfully served decedent Albie C. Sansbury and there followed and persisted an intimate companionship and personal care and attention and affection that cannot be measured in money. That decedent, Albie C. Sansbury, bargained for and received the benefit of plaintiff's companionship and affection, as well as her energies and attention of her services under and pursuant to the aforesaid agreement. That plaintiff never received any consideration or wages for services rendered, or any part thereof, in aforesaid relationship. That decedent Albie C. Sansbury apparently in good health, was suddenly stricken while working in

his garden acres. That said decedent Albie C. Sansbury did not perform the aforesaid agreement on his part to be performed and failed and neglected to convey, assign, and devise a child's portion of his property to the plaintiff, as he had agreed to do. That plaintiff in justice is entitled to have, receive, and to be decreed to her an undivided one-quarter of decedent Albie C. Sansbury's estate that he died possessed of." (R. pp. 2 and 3.)

A jury was called to sit in the case to determine one question only, whether or not the oral contract, alleged to have been made by the parties, was made.

At the close of the testimony, the trial court as part of his charge to the jury instructed said jury as follows:

"It is admitted that there was no will left by Mr. Sansbury before he died.

"Now, it is the claim of each plaintiff that their mother, Alice Ames Sansbury, was a widow in 1907, living in St. Paul, Minnesota. That at that time or just before that time, there were two men interested in her as a prospective wife, a William Hart and Mr. Sansbury. That she was living with her three children at that time. That each of these two men courted her at the place where she lived with the children, and each plaintiff claims that she was interested in the welfare of the children, in addition to her own welfare as to marriage; and that on the marriage with Mr. Sansbury there was an agreement made between Mr. Sansbury on the one part and the mother and her three children on the other part that on their marriage the children should be given the same rights as if they were natural children of Mr. Sansbury.

"And the claim is that on August 20th, in the Garfield Hotel, in this city, the contract was definitely stated; and that thereafter the claim is by each plaintiff that the three children lived with Mr. Sansbury and Mrs. Sansbury as their natural father and mother, and they claim that because of the relationship so instituted at that time through this agreement, there was a state of affection and confidence between the step-father and the children and the mother and the children which cannot

be compensated in money. And they claim that they are entitled to, under the agreement of the father, a share of the estate which they would have if they had been his natural children with Mrs. Sansbury.

"In each case the defendant denies that there was any agreement; denies that there was any performance of that agreement, if there was one. And the defendant Margueriette DeKarlo claims that she not only is the adopted daughter of Albie C. Sansbury and his wife, Alice Ames Sansbury, but that she is the real daughter of her adopted father. In other words, that her father was unfaithful to his wife and that she was the innocent result of that unfaithfulness. This took place apparently about the time that Mrs. Sansbury's son, Ray, had left the family because of his marriage.

"And the defendant, Margueriette DeKarlo, claims that she is entitled to the whole estate, irrespective of the claim of each plaintiff that their mother, in their presence, made an agreement with her father, long before she was born, that they should be his natural children.

"I instruct you that an adopted child in this State, in so far as the estate of a parent is concerned, is no better than the claim of a natural child of that parent, and it is no worse. Whether the defendant, Margueriette DeKarlo, is the natural child of Mr. Sansbury does not add to the rights that she would have to his estate because admittedly she is the adopted daughter of him and his wife.

"The burden of proof in this case is upon each plaintiff to prove by a preponderance of the evidence the claim he makes as to the making of this agreement. And that is the only question that will be submitted to you: Was there such an agreement made? I will speak of that later. By preponderance of evidence, I mean the greater weight of the evidence.

"I charge you that a person in this State may obligate himself to make his or her will in a particular way, or to give certain or specific property, or all his or her property to a particular person or persons so as to bind his estate. But Courts are strict in looking into the nature and circumstances of such contracts and

require satisfactory evidence of their fairness and justice. Of course, if the consideration for the contract is merely labor and services which may be estimated and their value liquidated in money so as to make the promisee hold, then specific performance would not be performed or enforced. But if the consideration for the contract is that the promisee—the children and the wife—which assume a peculiar and domestic relationship to the promissor and render him services of such a peculiar character because of the friendly relationship that it is practically impossible to estimate the value by any pecuniary standard, then specific performance may be enforced.

"Under the statutes of this Sate, as you have been told by counsel, a witness in a suit who may be interested in the result of a lawsuit or a party to the suit may not testify if objection is properly made to things that were said by a deceased person. Hence, in this case, on objection, there was no testimony from Muriel or Ray as to what the agreement was between the father and mother as to their status.

"The plaintiff claims there is sufficient testimony from other sources as to that, and the defendant claims there is not. I am submitting to you just one question in each case, and the question is this: Was there an agreement made on or about August 20th, 1907, between Albie C. Sansbury, on one side, and his wife, Alice Ames Sansbury, and her child, Muriel Bushaw, the plaintiff herein, on the other side, that thereafter the relationship of natural father and child should exist between Albie C. Sansbury and the child, Muriel Bushaw? There will be an answer of yes or no to that question.

"The same question is in each case, except, of course, the name of the promisee, the child, is different in each verdict.

"You will take up the questions of fact in this case as judges of the facts, and you will exercise your own judgment, your reasoning power, your common sense, as men and women of good judgment and common sense. You are to go by the evidence presented here before you, and by that only" (R. pp. 30 to 33).

The trial court made findings and conclusions and a memorandum made part of the decision, and order for judgment for each petitioner, the plaintiffs in said actions, and all are similar, and some paragraphs of the findings of fact and conclusions of law including memorandum made part of the decision, in behalf of petitioner, Muriel F. McCarty, are as follows:

"IV. That Mrs. Leah H. Rempher, who was a witness in these proceedings, is the maternal aunt of the plaintiff, and during the early part of the century lived at Grand Forks, North Dakota, with her family; that she frequently visited her mother at the family home in Medford, Wisconsin, when she also visited her sister, Alice, the mother of plaintiff. That in 1906, when she visited her sister, Alice, and her daughter, the plaintiff, and her son, Ray, and her daughter, Marvel, Alice and her said three children were living at 1672 West Seventh Street, St. Paul, Minnesota, where and when she met and became acquainted with one William Hart, who had proposed marriage to her sister, Alice, and had offered to agree in substance if she married him to make her daughter, the plaintiff, and her two other children, members of his family, consider and treat them as his own and be a natural father to them. That also on this same visit to her sister, Alice, Mrs. Leah H. Rempher met and became acquainted with one Albie C. Sansbury, a soldier in the United States Army, stationed at Fort Snelling, Minnesota, who was also very friendly to Alice; that her sister, Alice, further informed her in substance that if Albie C. Sansbury would agree to take and make her daughter, the plaintiff, and her two other children, members of his family, consider and treat them as his own children and be and become a natural parent to them, she would marry Albie C. Sansbury in preference to marrying William Hart. Mrs. Leah H. Rempher visited her sister, Alice, the following year when she was with her daughter, the plaintiff, and her two other children, living in and running the Garfield Hotel in Minneapolis, Minnesota. During this visit, and on August 20th, 1907, her sister, Alice, and Albie C. Sans-

bury were married. That on this occasion Mrs. Rempher was present and heard Albie C. Sansbury orally agree with her sister, Alice, and with and in behalf of the plaintiff and her sister and brother, in substance that Albie C. Sansbury did take and accept the plaintiff as a member of his family and that the relationship of natural parent and child would exist between them and that Albie C. Sansbury would consider, treat and do for plaintiff what a natural parent would do for his own child. That Mrs. Rempher thereafter visited several times with her sister, Alice Ames Sansbury, and Albie C. Sansbury, and the plaintiff and her brother and sister were living together as a happy and contented family and a happy, congenial and helpful family relationship existed between Albie C. Sansbury and the plaintiff and plaintiff's sister and brother.

"That in fact in arranging for and consummating this marriage with the plaintiff's mother, the said Albie C. Sansbury as a part consideration for said marriage agreed to take Alice's three children as his own children and treat them as their natural father; that the said Alice's three children would be his heirs at law; that from the time of the marriage the relationship of father and child would exist between him and each of said Alice's three children, including the plaintiff herein.

* * * * *

"VI. That plaintiff in pursuance of and in reliance upon the aforesaid agreement, understanding and oral contract, assumed her place as a child of the deceased said Albie C. Sansbury and rendered him services customarily rendered by a child to a parent. Plaintiff went to school, was reared and treated by Albie C. Sansbury as his child, and, in turn, treated him as her parent, and gave him the services, obedience and affection of a child. Plaintiff was treated in all respects as a member of the family of Albie C. Sansbury, and was a loyal, obedient and affectionate child to Albie C. Sansbury, yielding to him the respect, obedience and affection due from a child to a parent, and he returned the affection of a parent to his child, the plaintiff. The relation between Albie C. Sansbury and the plaintiff was at no time disagreeable,

disobedient or lacking in respect and affection. That plaintiff addressed Albie C. Sansbury as "Dad" and "Pa," and in turn was addressed as his child. That a number of persons, who were witnesses in this action, testified that they were neighbors of Albie C. Sansbury over a period of time and frequently visited the home of Albie C. Sansbury and that from their association with the family and their observance of the manner, speech and consideration of and towards each other, by Albie C. Sansbury and the plaintiff, their relationship was congenial and affectionate, plaintiff calling Albie C. Sansbury "Pa" and "Dad," who, in turn, addressed plaintiff as his child. That plaintiff, aside from performing work and services at home, also worked away from home and at several places and that the earnings and wages received were surrendered to Albie C. Sansbury after each payday. That plaintiff never received any compensation whatever for labor and services rendered Albie C. Sansbury, deceased, which labor and services were of the kind and nature that cannot be computed or calculated in money, and no evidence was offered from which any calculation or computation of compensation in money can be made.

* * * * *

"XI. That under the oral agreement aforesaid, between Albie C. Sansbury and the plaintiff, establishing the relationship of natural parent and child between them and in pursuance thereto and in fulfillment thereof, plaintiff made her home with Albie C. Sansbury until plaintiff's marriage, and conducted herself towards him as a dutiful daughter and helped him with his work and personally served and cared for him and devoted herself to serve him as he required and treated him as a father and permitted him to enjoy her companionship and society incident to such relation, and a strong affection grew between them that became deep and abiding, and their association of parent and child persisted until the death of Albie C. Sansbury.

* * * * *

"XXI. That plaintiff has no adequate remedy at law. That the work and services rendered by the plain-

tiff to and for Albie C. Sansbury were not those performed by an employee to an employer, but were of a domestic nature and character that included personal attention, intimate relation, companionship and society prevalent only among members of a family, living together in one household, for the measure of the value thereof there exists no pecuniary standard. That the plaintiff cannot be adequately compensated in damages.

"XXII. That Albie C. Sansbury, deceased, entered into and became bound by said agreement, which established the relation of natural parent and child between him and the plaintiff, by which he was obligated to give and leave at his death to this plaintiff, upon the performance by plaintiff of her part of said agreement, a one-quarter (¼) interest, a child's proportionate interest, in all the property, real and personal, of which he might die seized and possessed. That plaintiff has fully performed her part of said agreement so made, and is entitled to a one-quarter (¼) interest, a child's proportionate interest, in the property, real and personal, of which Albie C. Sansbury died seized and possessed.

* * * * *

"CONCLUSIONS OF LAW

I.

"It is adjudged and decreed that plaintiff be and she hereby is entitled to specific performance of her contract.

II.

"It is adjudged and decreed that plaintiff be and she hereby is the owner of a one-quarter (¼) interest, a child's proportionate interest, in all the property, real and personal, of which Albie C. Sansbury died seized and possessed, subject only to a one-quarter (¼) share in the funeral expenses and debts and of the expense of an impartial administration, including reasonable and just compensation for the administrator and reasonable and just fees for administrator's attorney for an impartial administration of the estate of Albie C. Sansbury, deceased.

III.

"It is adjudged and decreed that Margueriette H. DeKarlo have no right, title, interest, estate, claim or lien in and upon the property, real and personal, of which Albie C. Sansbury died seized and possessed, except as respects a one-quarter (¼) interest, a child's proportionate interest, therein, subject to a one-quarter (¼) share in the funeral expenses and debts and of the expense of an impartial administration, including reasonable and just compensation for the administrator and reasonable and just fees for administrator's attorney for an impartial administration of the estate of Albie C. Sansbury, deceased.

* * * * *

"MEMORANDUM

"Our State reports, as well as reports of other jurisdictions, are well sprinkled with cases involving specific performance of oral contracts, having to do with property and rights in property of decedents. Many cases cover situations somewhat similar to the general conditions here existing, but very seldom do we find two cases based on exactly similar situations, like conditions.

"The picture here displayed can well be visualized—along the first decade of this century the plaintiff's mother, no doubt a woman of some ability and of good appearance, twice married, twice divorced, given custody of her three minor children by the divorce courts, arrived in St. Paul, where she had at least two admirers. She has the good welfare of her children at heart. On her third matrimonial venture, she wants her three children to continue to have her care and attention, as well as the care and love of a father. She hopes that her third husband will agree to a father's responsibility as to her children and assume a father's place in their lives. And Albie agrees, in fact urges himself into the family, in full agreement that her wishes are his, and that he will fulfill his duty as father to the three. At the time of marriage he was, in 1907, a soldier at Fort Snelling,

at a soldier's rather meager pay. After his marriage to Alice, he develops, he takes heart, and earnestly and honestly enters into other active physical work, in which he grows and grows all the time during said marriage, helped also by some additional income from Alice's forbears. He makes money, saves money, accumulating a fairly nice estate with the help of his wife and his children. She died in 1947. In 1948 he died.

"The depressing part of this suit is that along in 1915 Albie forgot his own marriage vows to Alice, taken in 1907, and becomes intimate with another woman, and she has a child—his child with another woman—born August 28, 1916. Albie's wife, Alice, forgives him, takes his child at her age of five months into her home, and in October, 1923, she joins her husband in adopting his child into her own home, to be cared for and mothered by her, Alice, in the same way that she and Albie had agreed to get married on condition that he take on her three legitimate children and be a father to them.

"Instead of three children, she then had four. Albie, instead of three, whom he agreed to father, had also four. There is no question but what Albie and Alice's three children, from August, 1907, the date of marriage, lived as a happy, contented family, each doing his or her share—father and mother and three children. And there is no question but what Albie and Alice, after the adoption of Margueriette, continued to live a happy life, each helping fully. With Margueriette's advent into the family, Alice and Albie continued to do well. And the intent of all was that Albie and Alice had four heirs. Equity, backed by sufficient evidence, calls on me to so decide the case that each child will have one-fourth of the estate left by Albie and Alice.

"As before stated, no two cases are just the same. 'The great underlying purpose of the Court is to do justice. In many types of cases a rule which will do justice in every case cannot be laid down in advance. It is wisdom to refrain from making a hard and fast rule, since it might hinder the doing of justice in some instances.'

"See: Winne v. Winne, et al (N. Y.), 59 N. E. Rep. 832 (Mar. 12, 1901), a leading case.

"Dated this 25th day of February, 1950.

ALBERT H. ENERSEN,
a District Judge of the Ninth Judicial District (of Marshall, Minn.), sitting for and at the request of the Judges of this District.

"The undersigned presided at the trial of the above cause, and made findings of fact, conclusions of law, and order for judgment therein, on February 25, 1950, which was filed on the 27th day of February, 1950, and attached thereto was a memorandum, made and filed the same date, which memorandum is hereby ordered to be made a part of the aforesaid decision which, through inadvertence, was omitted and it was the intention of the Court to have made said memorandum a part of the decision, in the first instance.

"Dated March 24, 1950.

"By the Court,

ALBERT H. ENERSEN,
Judge."

(R. p. 51-52.)

STATEMENT OF FACTS DISCLOSED BY THE RECORD

The facts and circumstances found in the record are as follows: Prior to the marriage of Albie C. Sansbury to the mother of the three petitioners, they resided in St. Paul, Minnesota. Mrs. Leah Rempher, sister of the mother of the respondents, made them a visit in St. Paul in 1905, and she testified to the fact that a Mr. Hart thought so favorably of her sister that he wanted to marry her and would consider her children as if they were his own; but the mother of petitioners also knew a soldier in U. S. Army stationed at Fort Snelling, Minnesota, Mr. Albie C. Sansbury, who also thought so favorably of the mother of petitioners that he also wanted to marry her. Under this situation Mrs. Rempher was taken to Fort Snelling by her sister to meet this soldier, and, on

their return stated to her sister, Mrs. Rempher, that if Mr. Sansbury would agree to consider her children as his own and become a natural parent to them, she would marry him in preference to Mr. Hart. The next time Mrs. Rempher visited her sister, the mother of petitioners, in 1907, she lived in Minneapolis when she married Albie C. Sansbury; and, on this visit the contract in question in this case was entered into in the presence of Mrs. Rempher, as her testimony discloses. After said marriage, daughter Muriel lived and worked at home and when she worked outside, brought her earnings home, all to sustain and maintain that family relationship embodied in the oral contract aforesaid. She continued to render domestic service and furnish companionship and society of that of a child to a parent, until she married, when she moved to Wisconsin. The relationship that existed between children and parents in the Sansbury home is disclosed by the testimony of five witnesses who were intimately associated with the Sansbury family at the time and up to the marriage of Muriel who then had completed her contract. Her marriage, however, did not end the relationship of parent and child with her parents; and the relationship remained unto the very time of death of Mr. Sansbury as the evidence discloses. Ray Franklin Bushaw fulfilled the relationship of son and parent from the date of the aforesaid contract until he married when he was twenty-two years old.

Ray, like Muriel, until he married, performed all kinds of domestic duties and when working out contributed his earnings to the family and afforded society and companionship of that of a son to Mr. Sansbury. Marvel Sansbury, when 16 years old, about 1921, was adjudged incompetent and was confined for six years, and except for this time, she rendered services continuously in the Sansbury family such as wash-

ing, cleaning house, cooking and caring for the garden. She took Mr. Sansbury's name; although handicapped she added her bit to maintain the Sansbury family relationship. The acts, behavior and language and consideration of these three petitioners for Mr. Albie C. Sansbury and his reciprocity thereto, the evidence discloses, could have been no more intimate, filial, obedient, companionable and affectionate, than if their relation had been that of blood of parent and children. The last birthday of Albie C. Sansbury, his wife having predeceased him, was celebrated at his home on 80th and Lyndale Avenue North by all the members of the Sansbury family, including the third generation. The close association of Albie C. Sansbury with the three petitioners is one continous unbroken story by respect, deep consideration, affection and that intimate society relationship existing in families which the evidence discloses existed to the very last day of his life. The evidence of the life of this family since 1907 up to the death of Mr. Sansbury depicts a relationship which is the very warp and woof of society making family life the unit in our democratic form of society without which it could not be maintained.

Respondents claimed that Marvel did not fall within the terms of the contract. After her mother's death respondents' witness, Mrs. Ferragin, testified that Mr. Albie C. Sansbury paid her for Marvel's keep. Also, petitioners McCarty testified that after their mother's death, Mr. Albie C. Sansbury paid for Marvel's keep at the Hopkins Home. Mr. Sansbury was only complying with his contract made in 1907 with her mother. Petitioners had fulfilled their part of their agreements with Albie C. Sansbury, but he failed to carry out his part with them and died intestate.

In this case in the court below the one question of whether an agreement as claimed by respondents was made, was sub-

mitted to a jury for a special verdict and the jury found in the affirmative. The Court adopted the verdict of the jury, and made findings and conclusion that petitioners had specifically performed their contracts with the decedent, Albie C. Sansbury, who had failed to perform his part thereof; and thereupon ordered specific performance thereof decreeing a child's interest, namely, a quarter interest of the decedent's estate to each of the petitioners. It is submitted that the evidence justified the verdict of the jury and justified the adoption of said verdict by the trial court and the making of the findings of fact and conclusions of law of the trial court as found in the record and the judgment entered thereon from which respondents appealed and secured a reversal of the three judgments.

There was no federal question in this case until it was first made in petitioners' petition for re-argument. The petitioners obtained a favorable special verdict of the jury, also obtained favorable findings of fact and conclusions of law in the trial court upon which judgments were entered in favor of petitioners, no motion having been made theretofore on account of any error in the trial proceedings. Defendants-respondents appealed from said judgments and secured a reversal of them. Thereafter petitioners made a petition for re-argument wherein was drawn in question the 14th Amendment of the Federal Constitution and setting forth that the petitioners had been denied due process of law and equal protection of laws in the decision of the Supreme Court of Minnesota in that it deprived petitioners of rights, liberty and property guaranteed them by the aforesaid 14th Amendment, which claim was set out in petitioners' petition for re-argument in the following language:

> "Respondents claim that the decision of this honorable court rendered March 16, 1951, reversing the final judgments of the trial court rendered in favor of re-

spondents nullified and held for naught the rights of the respondents under their contracts judicially established in the lower court which resulted in an abridgement of their rights and immunities as citizens of the United States and of the State of Minnesota in contravention of Section 1, Article 14, of the Amendments of the United States Constitution, and the decision of this honorable Court under said Amendment deprived respondents of their liberty and their property without due process of law and denied to each of them within its jurisdiction the equal protection of the law."

JURISDICTION OF THIS COURT

The jurisdiction of this Court to review by writ of certiorari judgments of the highest state court is determined and based upon 28 *U. S. C.*, Section 1257 (3), providing that it shall be competent for this Court by certiorari to require that there be certified to it for review and determination with the same power and authority and with like effect as if brought by writ of error, any cause wherein a final judgment or decree has been rendered by the highest court of a State in which a decision could be had on any title, right, privilege, or immunity, especially set up or claimed by either party under the Constitution, or any treaty or statute, or commission held or authority exercised in the United States.

It was under this federal claim of rights by petitioners in various divisions of their petition, wherein it is claimed that the Minnesota Supreme Court, in making its decision, weighed the evidence and determined the credibility of witnesses and usurped the function of the trier of facts.

That some conclusions in the opinion of the highest state court are without factual bases in the evidence, and as an instance thereof that the principal testimony of Mrs. Leah Rempher concerning the statement made by Albie C. Sansbury about his agreement with petitioners' mother to make

petitioners his children and treat them as a father would, was not made in the presence of the petitioners and confusingly joined this statement with that made by Mr. Albie C. Sansbury to witness Carl Otto Frenzel in a conversation that took place many years after the agreement in question had been made and was in Mr. Sansbury's home, where Mr. Frenzel was visiting him and remained over night, and there were no other persons present.

In *Carlson vs. Curtiss,* 234 U. S. 103, at pages 105-106, the Court said:

> "* * * Our examination of the Federal question is somewhat embarrassed because the findings and statements of fact by the state courts contain no finding respecting some of the facts that are alleged as the basis of the present contention of plaintiff in error.
>
> * * * * * *
>
> "* * * While in ordinary cases we are bound by the findings of the state court of last resort respecting matters of fact, it is hardly necessary to say that that court cannot, by omitting to pass upon the basic questions of fact, deprive a litigant of the benefit of a Federal right, any more than it could do so by making findings that were wholly without support in the evidence. And just as this court, where its appellate jurisdiction is properly invoked and all the evidence is brought before it, will, if necessary for a decision of a Federal question, examine the entire record in order to determine whether there is evidence to support the findings of the state court, so it is our duty, in the absence of adequate findings, to examine the evidence in order to determine what facts might reasonably be found therefrom and which would furnish a basis for the asserted Federal right. *Southern Pacific Co. vs. Schuyler,* 227 U. S. 601, 611, and cases cited."

That a higher degree of proof was asserted to govern the testimony of petitioners' witnesses than that enunciated by the trial judge in his instructions to the jury and that required by law.

The three decisions, namely, *Brasch vs. Reeves,* 124 Minn. 114, 144 N. W. 744; *Hanfield v. Fairbrother,* 191 Minn. 547, 254 N. W. 821, and *Greenfield vs. Peterson,* 141 Minn. 475, 170 N. W. 496, cited by the Minnesota Supreme Court as a basis for overruling and reversing the judgment of the trial court, it is submitted, fail to support respondents' contention for said cases, they being the principal ones cited in their brief, but sustain the decisions of the trial court.

That the Minnesota Supreme Court decision overrules a long line of decisions in Minnesota commencing with *Swanburg vs. Foseen,* 75 Minn. 350, 73 N. W. 4, wherein the three nieces were taken into a home of their uncle under a verbal agreement that they were to be treated as his children and who thereafter shared in his estate down to the present in similar cases cited in respondents' brief.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

Petitioners' actions were instituted to enforce an oral contract whereby they became children of decedent Albie C. Sansbury and he their parent to obtain for each a child's share in his estate, and to bring the same out of the Statute of Frauds, partial or full performance of said contract must be proved. The decision of the highest state court of Minnesota wholly failed to recognize the complete performance of petitioners' part of this oral agreement; and it was only by the consideration by the triers of facts of the life of Albie C. Sansbury and the life of the three petitioners living together in one household in the relationship of parent and children that enabled them to believe and find and render their special verdict that such an agreement was made.

In *Files vs. Brown,* 124 Fed. Rep. 133, at page 136, the Court stated:

> "* * * The difference between actions at law and suits in equity is a matter of substance, not of form. It

inheres in the natures of the causes of action, in the principles which control and in the remedies which follow them, and it cannot be eradicated either by a change of form or by the abolition of forms. A legal cause of action cannot be maintained in equity, because there is an adequate remedy for it at law, and it is only where there is no such remedy that relief in equity may be successfully sought. Equitable causes of action are not available at law, because they invoke the judgment and appeal to the conscience of the chancellor, and the free exercise of that judgment and conscience is prohibited in actions at law by the rule which entitles every party to a trial of all the issues of fact by a jury."

Minnesota Statutes 1949, Chapter 513:

"513.01. *No Action on Agreement, When.* No action shall be maintained, in either of the following cases, upon any agreement, unless such agreement, or some note of memorandum thereof, expressing the consideration, is in writing, and subscribed by the party charged therewith:

(1) Every agreement that by its terms is not to be performed within one year from the making thereof;

(2) Every special promise to answer for the debt, default or doings of another;

(3) Every agreement, promise, or undertaking made upon consideration of marriage, except mutual promises to marry;

(4) Every agreement, promise or undertaking to pay a debt which has been discharged by bankruptcy or insolvency proceedings. [R. L. s. 3483] (8456)"

"513.06. *Specific Performance.* Nothing in this chapter contained shall abridge the power of courts of equity to compel the specific performance of agreements in cases of part performance thereof. [R. L. s. 3489] (8461)"

The highest state court of Minnesota wholly ignored the last paragraph of paragraph IV of the Court's Findings of Fact, namely:

"That in fact in arranging for and consummating this marriage with the plaintiff's mother, the said Albie C.

> Sansbury, as a part consideration for said marriage, agreed to take Alice's three children as his own children and treat them as their natural father; that the said Alice's three children would be his heirs at law; that from the time of the marriage the relationship of father and child would exist between him and each of said Alice's three children, including the plaintiff herein." (R. p. 40.)

The highest state court of Minnesota ignored the trial court's Finding of Fact No. XV, as well as the trial court's Memorandum made a part of the Court's decision, concerning the four children of Albie C. Sansbury and Alice Ames Sansbury, and the division of the estate equally among them.

In *Creswill v. Knights of Pythias*, 225 U. S. 246, at page 261, the Court said:

> "* * * While it is true that upon a writ of error to a state court we do not review findings of fact, nevertheless two propositions are as well settled as the rule itself, as follows: (a) that where a Federal right has been denied as the result of a finding of fact which it is contended there was no evidence whatever to support and the evidence is in the record the resulting question of law is open for decision; and (b) that where a conclusion of law as to a Federal right and finding of fact are so intermingled as to cause it to be essentially necessary for the purpose of passing upon the Federal question to analyze and dissect the facts, to the extent necessary to do so the power exists as a necessary incident to a decision upon the claim of denial of the Federal right. *Kansas City So. Ry. Co. vs. Albers Comm. Co.*, 223 U. S. 573, 591; *Cedar Rapids Gas Co. vs. Cedar Rapids*, Ib. 655, 668; *State of Washington ex rel. vs. Fairchild*, 224 U. S. 510."

There is an obscurity and confusion that permeates the decision of the highest state court of Minnesota in reference to facts, law and rules of equity governing.

In *Minnesota vs. National Tea Co., et al*, 309 U. S. Rep. 551, at pages 555 and 557, the Court said:

"* * * This Court has frequently held that in the exercise of its appellate jurisdiction it has the power not only to correct errors of law in the judgment under review but also to make such disposition of the case as justice requires. * * *

"* * * But it is equally important that ambiguous or obscure adjudications by state courts do not stand as barriers to a determination by this Court of the validity under the federal constitution of state action. Intelligent exercise of our appellate powers compels us to ask for the elimination of the obscurities and ambiguities from the opinions in such cases. * * *"

Evelyn Martha McCarty, daughter-in-law of petitioner McCarty, testified to the fact that she was introduced by her husband to Albie C. Sansbury, as her husband's grand-dad.

Florence Sarah Stasel, Sylvia June Derby Peterson, Mrs. Richard Wagner, Charles W. Derby, and Elmer Oscar Almquist, all witnesses for petitioners, all of whom lived as neighbors of Albie C. Sansbury and family for a period of about three years from 1908 to 1912, all testified to the relationship of Albie C. Sansbury to the petitioners as that of parent and children, the petitioners addressing Albie C. Sansbury as "Pa" and their mother as "Ma," and that they lived together as a happy family, as each observed of their conduct among each other and their language to each other.

In *Jones National Bank vs. Yates*, 240 U. S. 541, at page 563, the Court said:

"* * * The questions of fact, so far as they arose upon a substantial conflict in evidence, were for the trial court. *Citizens Ins. Co. vs. Herpolsheimer, supra; Madison Bank vs. Gross, supra.* It is not necessary for us to review the evidence in detail. It is sufficient to say that our examination of it has convinced us that the findings of the trial court, at least with respect to the last mentioned reports, had substantial support; and, in this view, we must conclude that the reversal of the judgments, as entered in the trial court, upon the ground of

the legal insufficiency of the plaintiffs' case when tested by the Federal statute, was error."

It stands admitted that an appellate court has a right to go into an examination of the evidence presented in the trial court to ascertain the sufficiency thereof to support the decision in said court; but such examination goes only so far as ascertained if there is a conflict in the testimony, or if there is substantial evidence to support the decision, and if a jury has sat in the case and rendered a verdict on which the decision is made, and when that is found the decision is affirmed. *Fred Blume vs. Gust Ballis, et al,* 207 Minn. 393, 291 N. W. 906; *State ex rel. Northern Pump Co., Relator, vs. So-called Village of Fridley, et al,* decided March 30, 1951, while petitioners' case was pending and before final decision thereof was made by denying petitioners' petition for reargument May 17, 1951.

In *Truax, et al, vs. Corrigan,* 257 U. S. Rep. 312, the Court said at pages 324-325:

> "* * * In cases brought to this court from state courts for review, on the ground that a federal right set up in the state court has been wrongly denied, and in which the state court has put its decision on a finding that the asserted federal right has no basis in point of fact or has been waived or lost, this court as an incident of its power to determine whether a federal right has been wrongly denied, may go behind the finding to see whether it is without substantial support. If the rule were otherwise, it almost always would be within the power of a state court practically to prevent a review here. *Kansas City Southern Ry. Co. vs. Albers Commission Co.,* 223 U. S. 573, 591, 593; *Cedar Rapids Gas Light Co. vs. Cedar Rapids,* 223 U. S. 655, 668, 669; *Southern Pacific Co. vs. Schuyler,* 227 U. S. 601, 611. Another class of cases in which this court will review the finding of the court as to the facts is when the conclusion of law and findings of fact are so intermingled as to make it necessary, in order to pass upon the question, to analyze

the facts. *Northern Pacific Ry. Co. vs. North Dakota*, 236 U. S. 585, 593; *Jones National Bank vs. Yates*, 240 U. S. 541, 552, 553."

And at pages 332-333:

"* * * Our whole system of law is predicated on the general, fundamental principle of equality of application of the law. 'All men are equal before the law,' 'This is a government of laws and not of men,' 'No man is above the law,' are all maxims showing the spirit in which legislatures, executives and courts are expected to make, execute and apply laws. But the framers and adopters of this Amendment were not content to depend on a mere minimum secured by the due process clause, or upon the spirit of equality which might not be insisted on by local public opinion. They, therefore, embodied that spirit in a specific guaranty.

"The guaranty was aimed at undue favor and individual or class privilege, on the one hand, and a hostile discrimination or the oppression of inequality, on the other. It sought an equality of treatment of all persons, even though all enjoyed the protection of due process."

QUESTIONS PRESENTED

The questions presented by petitioners' petition herein for a Writ of Certiorari are:

1. Whether the actions herein by petitioners against R. R. Nelson, Administrator of the Estate of Albie C. Sansbury, and Margueriette H. DeKarlo, wherein it is alleged that the decedent Albie C. Sansbury entered into an oral agreement at or about the time of his marriage, October 20, 1907, to a widow, Alice A. Hierlmier, and her three children, the petitioners, and in consideration of said marriage, to their mother, agreed to make them his own children and become a natural father to them and on the further consideration of the services, society and filial affection of said children to their said father, there was sufficient evidence given in the trial of said actions for specific performance of said oral agree-

ment to secure a child's interest in the estate of Albie C. Sansbury, warranting a favorable special jury verdict and favorable findings of fact, conclusions of law and memorandum made a part of the decision by the trier of facts, upon which judgments were entered.

2. Whether the testimony of witness, Leah Rempher, concerning the language used in the making of the verbal agreement herein in question between Albie C. Sansbury on one side, and Alice Ames Sansbury, and petitioners, on the other side; and the circumstances of the presence of petitioners when said agreement was made disqualified them as witnesses in the proof of the agreement in which they were interested and were permitted to testify that they were present at the aforesaid conversation and heard what was said, which was thereafter repeated to them; and the testimony of witness Charles W. Derby, who testified to the fact that when the Sansbury family moved into the neighborhood where he was living in 1909, he was introduced to Ray and Muriel by Albie C. Sansbury as his son and daughter; and the testimony of the witness, Carl Otto Frenzel, a friend of Albie C. Sansbury, who visited Albie C. Sansbury at his home, where he remained over night in 1933 when Mr. Sansbury in his conversation about his family admitted responsibility for the three petitioners, and stated that he would take care of the petitioners as well as Margueriette since he could not take anything with him; and the testimony of witnesses Almquist, Peterson, Wagner and Stasel, all living as neighbors of the Sansbury family, visiting frequently, testified to the fact that in the conversations between the children, petitioners, and Mr. Sansbury, they addressed him as "Pa," and from the conduct of the family observed, and the language heard used between them, disclosed a happy family relationship; and the testimony of Ferne and George Organ and Evelyn McCarty, and Norman Nelson, members of the

third generation of the McCarty family, and grandchildren of Albie C. Sansbury, all of whom testified to the fact that each one addressed him as "grandpa" and "granddad"; all of above testimony was sufficient evidence in support of the family relationship between petitioners and Albie C. Sansbury of natural children and natural father which relationship grew out of the agreement entered into at the time of the marriage of their mother to Albie C. Sansbury.

3. Whether in view of all the testimony not only given by the aforesaid mentioned witnesses but all the testimony of the defendants' witnesses, upon which the weight of evidence was resolved in favor of petitioners, by the rendition of a favorable special verdict and by the making of favorable findings of fact, conclusions of law, and memorandum made part of the decision by the trial court decreeing a child's share, a one-fourth interest in the estate of Albie C. Sansbury; and, decreeing a child's share and a one-fourth interest to defendant, Margueriette H. DeKarlo. There being no motion for amended findings or for a new trial on account of any error occurring during the said trial, judgments were entered, wherefrom defendants appealed to the Supreme Court of Minnesota and secured a reversal of said judgments, the decision being made and filed March 16, 1951. Petitioners thereupon timely made a petition to the highest court of the State of Minnesota, the Supreme Court, for re-argument and re-hearing of aforesaid decision, setting up a federal question, namely, that the decision so made by the highest state court reversing the judgments of the trial court, was violative of the Fourteen Amendment of the Constitution of the United States in that it deprived petitioners of their rights, liberties and property in violation of the due process of law clause and the equal protection of law clause of the aforesaid Fourteenth Amendment. Petitioners' petition for re-argument was denied May 17, 1951, making the judgment

of the highest state court final, whereupon this petition for writ of certiorari is based. Petitioners believe they are entitled to the issuance by this Court to its writ of certiorari herein.

SPECIFICATION OF ERROR TO BE URGED

The Supreme Court of Minnesota, in its opinion in said causes, erred:

1. In holding and deciding that the evidence adduced at the trial of the causes below did not suffice to sustain a special verdict of the jury and the findings of fact and conclusions of law and memorandum made a part of the decision, and that therefore petitioners as a matter of law and equity were not each entitled to a child's share in the estate of Albie C. Sansbury.

2. In holding and deciding that the evidence which was adduced at the trial was insufficient to support the judgment of the trial court.

3. In holding and deciding that the special verdict of the jury was of no significance in these cases.

4. In holding and deciding in effect that under the evidence adduced each petitioner had no case.

5. In reversing the judgments obtained by petitioners in the trial court.

6. In denying petitioners' petition for re-argument and re-hearing wherein was set out and claimed that the decision of the highest state court was violative of the Fourteenth Amendment of the United States Constitution in that it deprived petitioners of their rights, liberties, and property without due process of law and without equal protection of the law guaranteed to them by the aforesaid Fourteenth Amendment of the United States Constitution.

PRAYER OF PETITIONERS

Wherefore, petitioners pray that Writ of Certiorari be issued by this Court directed to the Supreme Court of Minnesota to the end that the decision and judgment of said Supreme Court of Minnesota in causes entitled

Muriel F. McCarty, Plaintiff and Respondent, vs. R. R. Nelson, Administrator of the Estate of Albie C. Sansbury and Margueriette H. DeKarlo, Defendants-Appellants,

and

Ray Franklin Bushaw, Plaintiff and Respondent, vs. R. R. Nelson, Administrator of the Estate of Albie C. Sansbury, and Margueriette H. DeKarlo, Defendants-Appellants,

and

Marvel Sansbury, by Muriel F. McCarty, guardian ad litem, Plaintiff and Respondent, vs. R. R. Nelson, Administrator of the Estate of Albie C. Sansbury and Margueriette H. DeKarlo, Defendants-Appellants.

one appeal having been taken covering the three above named cases, bearing No. 35287, be reviewed by this Court as provided by law and that upon such review said decision and judgment be reversed, and that petitioners have such other relief as to this Court may seem appropriate.

Dated October 12, 1951.

MURIEL F. MCCARTY,
RAY FRANKLIN BUSHAW and
MARVEL SANSBURY,
by her Guardian ad Litem,
Petitioners.

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1301 Fourth Avenue South,
Minneapolis, Minnesota.

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CHARLES ELMORE CR

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

NO. 381

MURIEL F. McCARTY,

Plaintiff-Petitioner,

vs.

R. R. NELSON, Administrator of the Estate of Albie C. Sansbury, and MARGUERIETTE H. DeKARLO,

Defendants-Respondents.

RAY FRANKLIN BUSHAW,

Plaintiff-Petitioner,

vs.

R. R. NELSON, Administrator of the Estate of Albie C. Sansbury, and MARGUERIETTE H. DeKARLO,

Defendants-Respondents.

MARVEL SANSBURY, by MURIEL F. McCARTY, Guardian Ad Litem,

Plaintiff-Petitioner,

vs.

R. R. NELSON, Administrator of the Estate of Albie C. Sansbury, and MARGUERIETTE H. DeKARLO,

Defendants-Respondents.

SUPPLEMENTAL BRIEF FOR PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

MURIEL F. McCARTY,

Plaintiff-Petitioner,

vs.

R. R. NELSON, Administrator of the Estate of Albie C. Sansbury, and MARGUERIETTE H. DeKARLO,

Defendants-Respondents.

RAY FRANKLIN BUSHAW,

Plaintiff-Petitioner,

vs.

R. R. NELSON, Administrator of the Estate of Albie C. Sansbury, and MARGUERIETTE H. DeKARLO,

Defendants-Respondents.

MARVEL SANSBURY, by Muriel F. McCarty, Guardian ad Litem,

Plaintiff-Petitioner,

vs.

R. R. NELSON, Administrator of the Estate of Albie C. Sansbury, and MARGUERIETTE H. DeKARLO,

Defendants-Respondents.

SUPPLEMENTAL BRIEF FOR PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The denial by the Supreme Court of Minnesota of petitioners' petition for reargument of their cases on May 17, 1951, constitutes a denial of petitioners' rights guaranteed them under the Fourteenth Amendment of the Constitution of the United States.

The opinion of the Supreme Court of the State of Minnesota, after preliminary statements about parties and pleadings, holds in effect that by submitting an issue for a special verdict of the jury, destroyed the equitable status of plaintiffs' cases. Petitioners each brought their actions for specific performance to enforce an oral contract to secure a child's interest in the estate of their father and the trial court suggested that the question of whether or not this oral agreement was made could be submitted to the jury for special verdict. All agreed to call a jury to determine this one issue. The aforesaid ruling of the Supreme Court of Minnesota constitutes a denial of petitioners' rights guaranteed them under the Fourteenth Amendment of the Federal Constitution. The ruling so made constitutes a mixture of law, fact and equity and created confusion to be unraveled by this Court.

Then, by the language of the remaining decision of the Supreme Court of the State of Minnesota, there arises the question whether petitioners in their actions for specific performance of their agreements with the decedent, Albie C. Sansbury, in submitting to the jury for its special verdict the question of whether the said contract involved had been made, necessitated the consideration by the jury of all the evidence in the case going to the proof of performances of various and varied duties and the maintenance of father and child relationship on the part of petitioners in performance of said contract, and not only the consideration by the jury of the

substance of the language testified to that was used at the time the agreement in question was made, in order to enable the jury to render a special verdict on the question whether said contract was made or was not made.

The Supreme Court of Minnesota in its consideration of the decision in the trial court sets out in its opinion the form of the special verdict question as well as Finding of Fact XXII as being the pivotal finding of fact of the twenty-three findings of fact and Memorandum of the trial court made a part of the decision. Thereafter the Supreme Court of Minnesota set out the following:

> "On appeal, defendants contend that the trial court's Finding No. XXII, above quoted, and its other related findings, its conclusions of law therefrom and order for judgment for plaintiffs are not justified by the evidence and are contrary to law. At the oral argument, defendants' counsel conceded that the evidence was sufficient to support the special verdict of the jury in each case, i.e., that Albie C. Sansbury agreed to consider and treat plaintiffs as his own children, but maintained that the trial court's findings are not justified by the evidence and that the special verdict of the jury does not support the lower court's decision."

The substance of appellants' argument in support of their appeal is contained in their brief, pages 10 to 11, which is in the following language:

> "The record here is devoid of any basis which would justify the finding of a contract in any of the cases on appeal here. The only evidence supplied by plaintiffs which would tend in any way to support their claim of contract is found in testimony of Mrs. Leah Rempher and Otto Frenzel. She testified that right after the Sansburys were married, and while they were living in the Garfield Hotel, Minneapolis, she heard Mr. Sansbury say, 'If you kids do your part, why, I will do my best as a father to you children' (p. 107, ff. 1, 2 and 3; p. 108, ff. 1 and 2). She further testified, 'He said he was taking these children and going to do the best by them that he

could' (p. 109, ff. 1, 2 and 3). Her strongest testimony was that he said, 'I have agreed to take these three children as my own children and treat them as a natural parent would' (p. 185, f. 1).

"Otto Frenzel related a sole conversation he had with the deceased in which he claimed he was told that Sansbury 'would take care of the children just like his own' and that he 'was going to provide for each of them when he passed away' (p. 178, f. 2; p. 179, f. 1). There was no mention of a will (p. 182, f. 3).

"It is significant that the only direct promise made by Sansbury to his stepchildren, the plaintiffs, was that 'I will do my best as a father to you children.' All other evidence, such as it is, consists of his statements to Mrs. Rempher and Otto Frenzel, and that is taking the testimony on behalf of plaintiffs in its most favorable light and as being true. Even thus taken, the evidence does not constitute 'clear, positive and convincing proof' of an express, affirmative and positive contract. It cannot even justify a remote inference of a contract. There was no offer or acceptance. There was no promise or agreement. There was no contract.

"Assuming that the evidence justifies the special jury verdict which was adopted by the Court, it adds absolutely nothing to the solution of the issue. The jury's finding in each case, if it means anything, simply establishes that Albie Sansbury intended to treat his stepchildren as if they were his own natural children. That is certainly a far cry from a promise to leave them his property. A natural child has no more assurance of a vested inheritance than a stranger. He may be cut out without a cent. He is not the born or created promisee of property. And, if true, the expressed intention of Albie Sansbury to treat these plaintiffs as his own children was only a normal development following his marriage to their mother, and the understandable desire of a stepfather to get along harmoniously in the atmosphere which marriages of this kind usually generate."

The special verdict of the jury in favor of petitioners stands unchallenged and is a decisive question in petitioners' cases.

The judgments of the trial court were reversed on account of insufficiency of evidence in support of them. The prevailing rule exists that upon such an appeal if the Appellate Court finds in the record a decisive question decided in favor of respondent, the appeal will be dismissed and the judgment below affirmed. In the instant case, we have a jury that decided the decisive question in favor of petitioners. A recent case decided March 30, 1951, namely *State ex rel. Northern Pump Co., Relator, vs. So-called Village of Fridley, et al,* 47 N. W. (2d) 204; to the same effect are *Fred Blume vs. Gust Ballis, et al,* 207 Minn. 393, 291 N. W. 906; *Bakke vs. Bakke,* 175 Minn. 193, 220 N. W. 601; *Spies vs. Brandt,* 230 Minn. 246, 41 N. W. 561; *Locksted vs. Locksted,* 208 Minn. 551, 299 N. W. 266.

The decision of the Supreme Court of Minnesota, in view of the aforesaid decision, deprives petitioners of equal protection of the laws clause of the Fourteenth Amendment of the Federal Constitution.

The following decisions cited in the opinion of the Supreme Court of Minnesota augers for petitioners by the utterances therein found and quoted below:

In *Brasch vs. Reeves,* 124 Minn. 114, 144 N. W. 744, involving interpretation of a contract for specific performance, the Court said at page 146:

> "The law applicable to cases of this kind is well settled. There must be full and satisfactory proof of the fact of a contract and of its terms before there can be specific performance. If the contract is sufficiently proved and is definite in terms and has been performed by the plaintiff, and a peculiar and domestic relation has been assumed pursuant to which services incapable of pecuniary valuation have been rendered, specific performance will be decreed. The evidence is always to be examined attentively and weighed carefully. The object is to find the truth. The large burden of responsibility is on the trial court. (Citations omitted.)"

In *Hanfield v. Fairbrother,* 191 Minn. 547, 254 N. W. 821, the essence of the decision is contained in the following statement of the Court:

> "The oral agreement upon which plaintiff claims, made just before marriage of her father to Miss Fairbrother was in contemplation of marriage, was for an interest in real estate and so not enforceable because not in writing in complying with the statute of frauds. 2 Mason Minn. Statute (1927), Secs. 8456 to 8460. The findings are that plaintiff gave no consideration for that contract. That would be unnecessary if consideration were otherwise present. Plaintiff has not established that she made partial performance by way of services or otherwise to entitle her now to a decree of specific performance * * *."

In *Greenfield vs. Peterson,* 141 Minn. 475, 170 N. W. 496, the Court said therein, at pages 478-479:

> "It seems unlikely that plaintiff, burdened with the multifarious duties of her own home, could have had much time to devote to the Gummensons, or much occasion to assist them. But taking plaintiff's own statement of the amount and character of the services rendered, they are not sufficient to justify a court in enforcing specific performance of the alleged contract. She always resided in her own home with her husband and children and devoted herself to the duties of her own household. She never became an inmate of the Gummenson's home and never assumed that peculiar and domestic relation to the Gummensons as a member of their family and household, which is an essential element of such a part performance as will save the contract from being barred by the statute. (Citations omitted.)"

In *Edmund T. Carlson vs. Harry W. Carlson, et al,* 211 Minn. 297, 300 N. W. 900, at page 297, the Court says:

> "In a suit to compel specific performance of an oral contract to make a will, the Court found that plaintiff had failed to prove the agreement alleged in * * * his complaint or any other enforceable agreement by the kind and character of evidence which is required by law and

hence that there was no such agreement made. Judgment of dismissal was directed and later entered and plaintiff appeals."

The Court concludes its decision by saying in the last paragraph thereof:

"Measuring the evidence as disclosed by the record by the foregoing yardstick, we think there can be no doubt that at most plaintiff's case furnished a fact issue for the trial court. It has assumed and discharged the large burden of responsibility (Brasch vs. Reeves, supra), resting upon it, and upon this record, it is not for us to interfere."

Kinæ vs. Knozky, 135 Minn. 327, 160 N. W. 868, also cited in the opinion on the facts disclosed therein it is submitted it is also inapplicable to petitioners' cases.

Petitioners were denied the rights guaranteed them under the Fourteenth Amendment of the Federal Constitution in applying the aforesaid decision in the defeat of their rights.

The Supreme Court of Minnesota wholly ignored the Memorandum of Findings and Conclusions of the trial court as well as Finding of Fact XXV, involving the parenthood of defendant Margueriette H. DeKarlo and her adoption and her status in this case. The record disclosed that Albie C. Sansbury was the father of this defendanf, but through the magnanimous fortitude of Alice Ames Sansbury, his wife, and her foregoing such act and forgiving her errant husband of his unfaithfulness to her in his marriage vows, consented to the taking in of said defendant into the home, and after six years, adopting her, making four children instead of three children in the Sansbury family. The trial court, sitting as an equity court to administer justly, adjudged and decreed that the estate of Albie C. Sansbury should be divided equally among the four children (R. p. 46, 51, 52, 202-9).

The testimony of the witness, Leah Rempher, disclosed her conversation with Alice Ames Hierlmeier before she married Albie C. Sansbury; that she would marry no man unless he agreed to take her three children as his own children and become a natural father to them. Petitioners cite the Court to this question as presented in their petition for reargument, and found in the record (R. pp. 328-330). Indicative of decision being violative of the Fourteenth Amendment of the Federal Constitution.

The question of the sufficiency of the evidence to establish said agreement was presented in petitioners' petition for reargument and refers this Court thereto (R. pp. 295-302). Indicative of decision being violative of the Fourteenth Amendment of the Federal Constitution.

The question presented when there is a conflict in the evidence was also a matter involved in petitioners' petition for reargument and this Court is referred in respect thereto (R. pp. 314 to 322). Indicative of decision being violative of the Fourteenth Amendment of the Federal Constitution.

The Supreme Court of Minnesota cited in the margin of its opinion the following cases: *In re Estate of Firle,* 197 Minn. 1, 265 N. W. 818; *Fiske vs. Lawton,* 124 Minn. 85, 144 N. W. 455. See *Odenbriet vs. Utheim,* 131 Minn. 56, 154 N. W. 741. These cases auger in support of petitioners' cases.

Fiske vs. Lawton, supra, cites *Lynn, et al, vs. Hockaday,* 162 Mo. 111, 61 S. W. 885, in support, which case involves the right of a person taken into a family without any written agreement and at the time of the trial in question only one witness remained to tell of the arrangement of this person becoming a member of the family which she did haltingly. The lower court held the evidence insufficient and on appeal there was a reversal, as well as a long opinion covering a situation of that character. Petitioners' witness, Leah Rem-

pher, had to testify to what occurred more than forty years ago, after the agreement of her sister, Alice Ames Hierlmeier, when she married Albie C. Sansbury. Other witnesses had passed beyond and those who were living were disqualified by interest in the cases. This case is cited in support of the opinion in *Dillman, et al, vs. Davison*, 239 S. W. 505, which involved another case of a youth being taken into the family without any written agreement as to his status therein, and to establish that status he had to depend on a verbal agreement made by his father before him in his behalf, the Court saying:

> "* * * But we think such agreement was clearly evidentiary of a previous parol agreement between William R. Moore and the father of the defendant on behalf of the defendant to adopt defendant and to make him an heir. From all the circumstances in the case the defendant was aware of this agreement. There is abundant evidence of performance on his part and that such performance was referable to the terms of such agreement, as well as to the apprenticeship agreement. * * *"

The conversation that took place around the table just after Albie C. Sansbury had married Alice Ames Hierlmeier and the utterances that Albie C. Sansbury made, is indicative of his having made the agreement with Mrs. Sansbury prior to her marriage to him; and that as a consideration for marriage to him he was obliged to agree to take her children as his own children and become a natural father to them. *Odenbreidt vs. Utheim,* supra, was a case where the claimant therein was a member of the family without written agreement as a child of the family and would have taken a child's share but was disinherited by a will, like any parent may do with his own blood child. Albie C. Sansbury, however, died intestate.

The Supreme Court of Minnesota in the last three paragraphs of its opinion confirms what it held in the first part

of its opinion, that petitioners' cases when they called a jury to decide an issue, the case lost its equitable status. The tenor of the expressions found in these paragraphs almost likens the writer of the opinion to a juror arguing with his fellow members of the jury to have the case decided according to his opinion of the facts. The evidence adduced by the parties, together with the reasonable inferences fairly and reasonably arising therefrom, tends to show that decedent, Albie C. Sansbury, made the oral contract in question and in accordance therewith petitioners and decedent lived as natural child and natural parent and the agreement was faithfully and fully performed on both sides, except that Albie C. Sansbury died unexpectedly without carrying to conclusion by distributing his estate before his death and by failure to make a will and leaving it to the law for distribution under which each child would share equally. A number of disinterested witnesses gave testimony of a working cooperation of petitioners with their father and of filial relationship exhibited and existing among them, as well as the testimony of the grandchildren of Albie C. Sansbury indicating a relationship of parent and child and grandparent and grandchild. There was substantial evidence that the lives of the parties, petitioners and decedent, demonstrated a mutual carrying out and fulfillment of the original agreement that made them father and child. The evidence in the case should be viewed in the light most favorable to the petitioners giving the petitioners the benefit of every inference favorable to them that may be reasonably drawn from the evidence. It is the province of the trier of facts to resolve all conflicts in the evidence and to pass upon the creditability of the witnesses and the weight to be given to their testimony; and if on any determinative issue in the case, reasonable and fair-minded men draw different inferences or conclusions to the evidence, such issue is one exclusively for the trier of facts.

The opinion of the Supreme Court of Minnesota indicates that it apparently followed the pattern of the written argument made to overthrow the judgments of the trial court by counsel for appellants on appeal therein and respondents herein and set out above.

We mean no disrespect to the honorable Judges of the Supreme Court of Minnesota who promulgated the opinion of that Court on review herein when we say that therein the Court rendered lip service to the rule that upon respondents' appeal in the State of Minnesota Supreme Court as appellants, the evidence must be taken most strongly against them and viewed in the light most favorable to the respondents there, and the petitioners herein; but utterly failed to apply the rule to the facts of the record before the Court; utterly failed to realize and make a proper application of the equitable principles governing actions in equity to the evidence adduced. The special verdict of the jury determined that the oral contract in question was made, which remains unchallenged by counsel or court, and upon which the findings of fact of the trial judge was based. There is such a mixture of law, fact and equity in this opinion warranting a review by this Court.

Respectfully submitted,

E. Luther Melin,
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1301 Fourth Avenue South,
Minneapolis, Minnesota.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 381

MURIEL F. McCARTY,

Plaintiff-Petitioner,

vs.

R. R. NELSON, Administrator of the Estate of Albie C. Sansbury, and MARGUERIETTE H. DeKARLO,

Defendants-Respondents.

RAY FRANKLIN BUSHAW,

Plaintiff-Petitioner,

vs.

R. R. NELSON, Administrator of the Estate of Albie C. Sansbury, and MARGUERIETTE H. DeKARLO,

Defendants-Respondents.

MARVEL SANSBURY, by Muriel F. McCarty, Guardian ad Litem,

Plaintiff-Petitioner,

vs.

R. R. NELSON, Administrator of the Estate of Albie C. Sansbury, and MARGUERIETTE H. DeKARLO,

Defendants-Respondents.

RESPONDENTS' BRIEF

The only claim presented by the petitioners is that the decision of the Minnesota Supreme Court in this matter, in and of itself, was erroneous, and thereby violated the rights of petitioners guaranteed to them under the Fourteenth Amendment of the Federal Constitution.

It has become axiomatic under the decisions of this Court that the judicial determination of questions by a state tribunal in the regular course of administration of the laws of the state after full hearing by all the parties, although erroneous, does not constitute a Federal question and furnishes no ground of jurisdiction for this Court to review the judgment of the State Court. The State Court must give effect to some statute or state constitution which violates the guarantees of the Fourteenth Amendment of the Federal Constitution, and the judgment of that Court must rest on the statute either expressly or by necessary implication.

New Orleans Waterworks Co. vs. Louisiana, 185 U. S. 336, and cases cited.

The provisions of the Fourteenth Amendment are directed only against violations arising from the exercise of the legislative power of the state. They do not reach mere errors committed by a State Court in passing upon questions of state law.

Cross Lake Club vs. Louisiana, 224 U. S. 632.

Enterprise Irrigation District vs. Farmers Mut. Canal Co., 243 U. S. 157, 37 S. Ct. 318, and cases cited.

The substance of the decision of the Minnesota Supreme Court in this case is that the petitioners did not prove a contract in their favor to make a will under the laws of the state. The lower State Court's decision to the contrary was reversed. Whether or not the highest Court of Minnesota thereby reached an erroneous result, whether or not it over-

ruled expressly or by implication previous decisions of its own which petitioners feel were correctly decided or whether or not that Court overlooked or expressly disregarded findings of fact of the lower court and jury which petitioners feel were compelled by the evidence, is of no material consequence. The fact remains that no Federal question is presented by the petition herein and this Court has no jurisdiction to review the judgment complained of.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1951

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No. 381

MURIEL F. McCARTY,

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MARVEL SANSBURY, by Muriel F. McCarty, Guardian ad Litem,

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R. R. NELSON, Administrator of the Estate of Albie C. Sansbury, and MARGUERIETTE H. DeKARLO,

Respondents.

PETITIONERS' PETITION FOR RE-HEARING OF THEIR DISMISSED PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF

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Supreme Court of the United States

OCTOBER TERM, 1951

No. 381

MURIEL F. McCARTY,

Petitioner,

vs.

R. R. NELSON, Administrator of the Estate of Albie C. Sansbury, and MARGUERIETTE H. DeKARLO,

Respondents.

RAY FRANKLIN BUSHAW,

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vs.

R. R. NELSON, Administrator of the Estate of Albie C. Sansbury, and MARGUERIETTE H. DeKARLO,

Respondents.

PETITIONERS' PETITION FOR RE-HEARING OF THEIR DISMISSED PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners Muriel F. McCarty, Ray Franklin Bushaw and Marvel Sansbury, by Muriel F. McCarty, her guardian ad litem, above named, respectfully petition this Honorable Court for a re-hearing of their petition for Writ of Certiorari dismissed November 26, 1951. Time has been extended on their petitions to February 19th, 1952, in which to file this petition for re-hearing to reconsider petitioners' case, and to vacate the dismissal made herein and grant petitioners' petition for Writ of Certiorari to review the decision and judgment of the highest Court in the State of Minnesota made final May 17, 1951, in cases lately pending in said Supreme Court of Minnesota entitled therein the same as above, except that the parties in each case respectively were designated as plaintiff-respondent instead of petitioner and defendants-appellants instead of respondents, wherein one opinion was rendered, the case number being 35287, reversing the three favorable decrees and judgments in behalf of the petitioners of the trial Court in the District Court, Hennepin County, Minnesota, which was filed in said State Court March 16, 1951. Petitioners thereafter timely filed their petition for re-argument and re-hearing, which petition raised a Federal question, namely, that said State decision violated the rights of petitioners guaranteed them under the 14th Amendment of the Federal Constitution, the first opportunity the petitioners had to claim such Federal right, and said petition was denied without opinion on May 17, 1951 (R. 272-290). The aforesaid decision is reported in 47 N. W. 2d 595, 233 Minn. 362. It is this decision that petitioners seek to have reviewed.

Decision and Judgment of the Highest Court in Minnesota

It is believed by petitioners that the Supreme Court of Minnesota, in these cases, manifestly discloses in its opinion originally filed March 16, 1951, such vacillation and incongruity on the part of that Court so as to effectively make clear and certain its error of judgment and law to an extent of being arbitrary and capricious in dealing with each of petitioner's cases, before petitioners petition for re-argument and re-hearing thereof; and that the Supreme Court of Minnesota upon petitioners' raising a Federal question and claiming a violation of their rights guaranteed them under the 14th Amendment of the Federal Constitution in their petition for re-argument, through lack of full appreciation and application of petitioners' rights claimed under said 14th Amendment, ordered a dismissal, without opinion, of petitioners' petition for re-argument, the injustices of which can now be corrected only on review by the Court to whom this petition is addressed.

Nature of Petitioner's Cases and Summary Statement of the Matter Involved.

Respondent R. R. Nelson is the acting administrator of the estate of Albie C. Sansbury, who died April 28, 1948, leaving an estate of approximately $20,000.00. He had married Alice Ames Hierlmier, a widow, August 20, 1907, and they thereafter lived a conjugal life until death parted them by the decease of Mrs. Sansbury on March 21, 1947. There were, by said marriage, no issue born unto them. Mrs. Sansbury had been twice married and twice divorced before marrying Mr. Sansbury. She had two children by her first marriage to Frank Bushaw, namely, petitioners Muriel F. McCarty and Ray Franklin Bushaw, and on December 12, 1901, when a divorce decree was rendered, it awarded Mrs. Bushaw (Mrs. Sansbury) the custody of the two children. Mrs.

Bushaw thereafter married Henry Hierlmier and there was one child of said marriage, Marvel Hierlmier, petitioner Marvel Sansbury, and they were divorced March 26, 1906; and the custody of Marvel, by the decree, was given to Mrs. Hierlmier (Mrs. Sansbury) (R. 85-86, 144-145). The pivotal question on which this litigation has revolved concerns the establishment of the status of Mrs. Sansbury's three children, petitioners herein, at the time she married decedent, Albie C. Sansbury, August 20, 1907. Petitioners allege in each of their actions that there was an oral agreement made on or about the time of the marriage of their mother to Albie C. Sansbury, namely (R. 2-3):

> "IV. That immediately after the marriage of Albie C. Sansbury to their mother on Aug. 20, 1907, the plaintiff and her aforesaid brother and her aforesaid sister and said Albie C. Sansbury and his wife, Alice Ames Sansbury, contracted orally by and between each other in fact and substance as follows:
>
> That if plaintiff and her said brother and her said sister would live in the house and home of Albie C. Sansbury and his said wife and live with them and give them their services as they should be directed until they had become of age or married, that in consideration thereof, at their death said Albie C. Sansbury and his said wife would give and leave to the plaintiff and to each of her said sister and her said brother full child's proportionate share as if they had been born unto them, of all the property, both real and personal, which they own and which they might own at the time of their death."
>
> * * * * *
>
> "VIIa. That plaintiff under and pursuant to aforesaid agreement assumed a peculiar and domestic relation to decedent, Albie C. Sansbury, as a member of his family; and conducted herself towards him as a dutiful daughter and obeyed and faithfully served decedent, Albie C. Sansbury, and there followed and persisted an intimate companionship and personal care and attention and affection that cannot be measured in money. That decedent, Albie C. Sansbury, bargained for and re-

ceived the benefit of plaintiff's companionship and affection, as well as her energies and attention of her services under and pursuant to the aforesaid agreement. That plaintiff never received any consideration or wages for services rendered, or any part thereof, in aforesaid relationship. That decedent, Albie C. Sansbury, apparently in good health, was suddenly stricken while working in his garden acres. That said decedent, Albie C. Sansbury, did not perform the aforesaid agreement on his part to be performed and failed and neglected to convey, assign and devise a child's portion of his property to the plaintiff, as he had agreed to do. That plaintiff in justice is entitled to have, receive, and to be decreed to her an undivided one-quarter of decedent Albie C. Sansbury's estate that he died possessed of."

That pursuant to said agreement and ever thereafter the relationship of parent and children existed and they lived in one household as one family addressing each other as natural children and a natural father would, giving each other service, society and affection of that of parent and children until petitioners Muriel F. McCarty and Ray Franklin Bushaw married. Petitioner Marvel Sansbury lived with the Sansburys until death broke up their home, and she was known as Marvel Sansbury. (Testimony of petitioner Muriel F. McCarty, R. 144-171, and testimony of petitioner Marvel Sansbury, R. 17, and petitioner Ray Franklin Bushaw, R. 85-110.)

The relationship of grandad and grandchildren existed between petitioner McCarty's children and Albie C. Sansbury (R. 171-179).

That respondent, Margueriette H. DeKarlo, was born out of wedlock August 28, 1916, and was adopted by Mr. and Mrs. Sansbury through court proceedings October 27, 1923 (R. 182-209, 82-85). On May 5, 1948, she petitioned the Probate Court of Hennepin County, Minnesota, to have R. R. Nelson appointed as administrator of the estate of Albie C.

Sansbury, who had died April 26, 1948, naming herself as daughter and sole heir of decedent's estate. Petitioners herein filed objections to said petition, as well as petitioned for administration therein, naming Margueriette H. DeKarlo, Muriel F. McCarty and Marvel Sansbury as adopted daughters of the decedent, and Ray Franklin Bushaw as adopted son of decedent, as heirs to decedendent's estate. Before the hearing of the petition of May 5, 1948, petitioners withdrew their objections and dismissed their petition on June 2, 1948, without prejudice, before any hearing or disposition had been had of the DeKarlo petition on May 5, 1948 (R. 67-75).

Petitioners thereafter and on July 2, 1948, instituted separate actions in equity in the District Court of Hennepin County, Minnesota, to have decreed to each of them a child's interest, conceding that Margueriette H. DeKarlo was entitled to a child's interest, and that each of the petitioners be decreed a one-fourth interest in the estate of Albie C. Sansbury (R. 1-14). These actions came to trial in October, 1949, and were tried together. It was agreed between the parties that a jury be called to determine the question of fact as to whether or not an oral agreement had been made on or about August 20, 1907, between Albie C. Sansbury on one side, and his wife, Alice Ames Sansbury, and her children, the petitioners, on the other side, that thereafter the relationship of natural father and child should exist between Albie C. Sansbury and each of the children (R. 24-26). The jury rendered a verdict in each of petitioners' cases that such an agreement had been made. The trial judge thereafter, on March 24, 1950, made separate findings and conclusions and memorandum in each case decreeing that each petitioner was entitled to a child's interest, a one-fourth interest, in the estate of Albie C. Sansbury, and judgments were docketed accordingly March 31, 1950 (R. 37-59).

There was no motion for amended findings and conclusions and no error at the trial was claimed by defendants. On April 21, 1950, defendants appealed from the aforesaid three judgments to the Supreme Court of Minnesota under one appeal (R. 271). The Supreme Court of Minnesota reversed all of said three judgments March 16, 1951 (R. 272-280). Petitioners' petition for re-argument was filed May 8, 1951 (R. 280-346). Petitioners' petition for re-argument was dismissed without opinion May 17, 1951 (R. 346). The title and date were inadvertently omitted so the order denying petition for re-argument is herewith set out in full:

(Petition Denied)

State of Minnesota
Office of Clerk of Supreme Court
St. Paul, Minn.

May 17, 1951

Muriel F. McCarty, et al,
Respondents,

vs. 35287

R. R. Nelson, Admr. of Estate of Albie C. Sansbury, et al,
Appellants.

Sir:

You will please take notice that on this date the following order was entered in the above entitled cause:

Ordered, that the petition for reargument herein be and the same hereby is denied and stay vacated.

Yours respectfully,

Grace Kaercher Davis,
Clerk Supreme Court.

Mrs. Leah Rempher, a sister of Alice, and a maternal aunt of the petitioners, was the only witness able to testify in regard to the oral agreement upon which petitioners' actions are based. She was present at the wedding and heard and participated in the conversation wherein Mr. Albie C. Sansbury stated in substance the agreement between him and

Alice Ames Hierlmier, who became his wife, to the effect that he was taking the three petitioners, children of his wife, as his own natural children and that he became a natural father to them and would treat them as a natural father would (R. 112, 113).

"Q. Did you have any conversations with Mr. Sansbury and your sister and the children at any time about these children and the marriage? * * *

A. Well, we were sitting around the dinner table, all of us, talking, and it was the night before I was to come home. No, it couldn't have been that night. Anyway, we were all there at the dinner table. They were making plans for the family, being recently married—

Mr. Abdo: Just the conversation, will you, please?

A. Well, I have to lead up to it, don't I? Anyway, they were talking about getting acreage somewhere. They wanted a farm and wanted a home away from that hotel. It wasn't the place for children. I know Charley spoke up and he said to Muriel and Ray and all of us—he said: 'If you kids do your part, why, I will do my best as a father to you children and go out on this place.' Then he also brought up the fact that the hotel wasn't a good place for Muriel and asked me if I would take Muriel to Grand Forks and put her in school up there. I think she was about twelve or thirteen years old. I'm not sure. I was reluctant to, working in an office from nine in the morning to six every night. I rather hesitated about it. Eventually I agreed to take Muriel to Grand Forks. Charley asked me if he shouldn't pay me board. I wouldn't take board. He said: 'I will furnish her bedroom,' and give me blankets. He got a pass to Grand Forks and she stayed there until the next March and went to school."

* * * * *

"Re-Direct Examination.

By Mr. Melin:

Q. Mrs. Rempher, in the conversation you had with Mr. Albie C. Sansbury and in the presence of your sister and Muriel and Ray, soon after his marriage, did Mr.

Sansbury say anything about a natural father, and if so, just relate what was said?

A. You mean when they were talking around the table.

Q. Yes.

Mr. Abdo: Answer that yes or no.

A. Yes or no? Yes, he did.

Q. (By Mr. Melin) Will you state what was said?

A. Well, he said he had agreed—they were talking about their marriage—he said he had agreed to give those children—

Mr. Abdo: Just a moment. I move that that be stricken on the ground it is not responsive.

The Court: Well, he did not use the third person when he spoke. You are asked to give the words he used.

Q. (By Mr. Melin) Well, substantially, what did Mr. Sansbury say in that regard?

A. Well, in telling me about it, to the best of my recollection, he said: 'I have agreed to take these three children as my own children and treat them as a natural parent would.' That is the substance of what he said."

Witness *Mrs. Leah Rempher* further testified in substance that her sister, Alice, would marry no man unless he would agree to take her three children as his own children and become and be a natural father to them (R. 111, 115):

"Q. Did you notice anybody else living there at the time?

A. Well, just the family was all.

Q. Did you have any meals there that you remember?

A. Yes. I stayed there a day or two. I have forgotten how long.

Q. Was anyone present at those meals that you remember?

A. Mr. Hart was there for dinner one night.

Q. Did you meet a man by the name of Albie C. Sansbury while visiting your sister at that time?

A. I did at that time, yes.

Q. Tell the Court and jury how you met Mr. Sansbury and what took place.

A. Well, before I met Mr. Sansbury my sister ex-

plained to me that Mr. Hart wanted to marry her and take the children as his own, that is, Ray, Muriel and Marvel. She wanted me to meet Mr. Sansbury because she liked him better than Mr. Hart. She wanted me to meet him. We took my baby and went out to Fort Snelling where I met him. I visited with him on that trip. That was the first time I had met Charles.

Q. The first time you met Charles Sansbury?

A. Yes."

"Q. (By Mr. Melin) State what your sister told you just prior to her marriage with Mr. Sansbury.

A. Well, she had been having a difficult time keeping the children together, and that was the time she took me out to meet Sandy or Mr. Sansbury, and she said, of course, she was concerned over these children, and she said she would not marry any man unless he would take her children as his own children. That's the statement she made then, and I know Alice well enough to know that she wouldn't have married again if she hadn't been sure he would have taken them.

Q. Your conversation at the Garfield Hotel included these facts that you just stated or the substance of them?

A. Well, it was in substance, yes. They were talking the whole thing over, their getting married, and the family."

Witness *Mrs. Leah Rempher* also testified to the fact that two years after the marriage she returned to visit the Sansbury family in Minneapolis and that from her observation of the family as well as hearing conversations between Mr. Sansbury and the children, they lived the life of a normal family of parents and children (R. 115, 116).

There were five witnesses who had lived as neighbors of the Sansbury family during 1909, 1910, 1911 and 1912 (R. 126-140). *Charles W. Derby* testified, in part, as follows (R. 127-128):

"Q. Did you visit back and forth, your family and the Sansbury family?

A. Oh, yes. We were together quite a bit.

Q. What did you observe about the Sansbury family,

if anything? About their relationship, if any, between the parents and the children?

A. Well, the first time I met the children there, he introduced them to me as his son and daughter.

Q. You heard conversation between the father, Mr. Sansbury, and these two children, did you not?

A. Oh, yes.

Q. How did he address the children?

Mr. Abdo: Just a moment. Will you please fix the time and place of the conversation?

Q. (By Mr. Melin) That is, at the last house they moved to? What is the address?

A. That was 4106 22nd Avenue."

* * * * *

"Q. (By Mr. Melin) How did they address each other?

A. Oh, the children called him father. Mrs. Sansbury, mother.

Q. How did Mr. Sansbury address the children?

A. Son and daughter.

Q. Over what period of time did this sort of conversation, addressing between the children and father, take place, especially between Mr. Sansbury and the children? How long a period of time?

A. Well, when I first met them. That was in 1908. Around there, 1908.

* * * * *

Q. What did you observe Ray do, the son, around the premises?

A. Well, he did a lot of work around there. Carrying in wood, taking care of the garden.

Q. Did they have any implements or any animals around there whereby they worked the garden?

A. I know they had a horse and buggy and a plow.

Q. Was the buggy used at any time?

A. Yes.

Q. How was the buggy used?

A. I seen Ray take his father to work.

Q. When he worked for the railroad?

A. Yes. The street car only run out to 34th and Cedar and we had to walk from 40th Street and 22nd

Avenue to 34th and Cedar to take the street car. So he would take him to work with the horse and buggy."

Witness *Mrs. Richard Wagner* testified in part as follows (R. 133, 134):

"Q. Now, did your family and the Sansbury family visit any?

A. Yes.

Q. How frequently?

A. Well, quite a bit. I think every day.

Q. Who were the members of the Sansbury family that you remember?

A. Well, Mr. and Mrs., and Marvel, the youngest, and Ray and Muriel.

Q. How did they act among themselves, if you observed?

A. Well, they always seemed to get along just fine. I never seen or heard any quarreling or any trouble among the parents or children.

Q. How did the children address the parents, both of them?

A. Well, mother and dad.

Q. How did the parents address the children?

A. By their names."

* * * * *

"Q. Did you notice any mechanism or animals around there?

A. Yes. I know they had a horse and chickens and they had a calf or a small cow.

Q. And who did you see working in the garden there?

A. Well, Ray mostly. They all helped.

Q. Who did you see driving the horse?

A. Ray, and Mrs., too.

Q. Did you see Mr. Sansbury with the horse and buggy at any time?

A. Yes."

* * * * *

"Q. What did you see Muriel do?

A. Oh, she helped around the house, washing, ironing, cooking, and everything."

Witness *Mrs. Florence Sarah Stasel* testified in part as follows (R. 140-142):

"Q. How frequently did you visit back and forth there?

A. Every chance I got. When mother couldn't find me she knew where to look for me.

Q. Then you were at the Sansbury home quite frequently?

A. Yes, sir.

Q. Will you name the members of the Sansbury family?

A. Well, Mr. and Mrs., Muriel was the oldest, and Ray, then Marvel.

Q. Then you participated in conversations with them, did you?

A. Certainly. I have had meals at their table.

Q. And you were exchanging visits?

A. Yes. Friendly. Attending Muriel's wedding there."

* * * * *

"Q. Now, Mrs. Stasel, did you hear any conversation between Ray and Mr. Sansbury about his working in the garden?

* * * * *

A. Do you want the exact date?

Mr. Abdo: Approximately.

A. Well, it would be in 1909 or 1910.

Q. (By Mr. Melin) And what was said by Mr. Sansbury?

A. Well, Ray was supposed to work in the garden.

Mr. Abdo: Just a moment. Just relate the conversation as you remember it.

A. Well, he came out and said, 'Why didn't you weed the onions as I asked you to?' 'That is part of your work around here.'"

* * * * *

"Q. Muriel sometimes?

A. Yes. What I remember distinctly about Muriel is she had a guitar that her father gave her, and she enjoyed it very, very much.

Q. Do you remember any particular happening there in the Sansbury family?

A. Muriel's wedding, for one.

Q. Was Muriel married out there?

A. She was married at 4106 22nd Avenue.

Q. Was that a family wedding?

A. A family wedding. Mr. and Mrs. Sansbury were there and all her neighbors and friends."

* * * * *

"Q. (By Mr. Melin) And after that wedding of Muriel's, what did she do?

A. After the wedding Muriel and her husband left for Medford, Wisconsin, the next day, and I haven't seen them over a period of a good many years."

Witness *Carl Otto Frenzel*, a friend of Mr. Albie C. Sansbury, testified that at one of the times when he stayed over night with Mr. Sansbury at his home in 1938, in a conversation with Mr. Sansbury about his family, he stated in part the following (R. 121-123):

"Q. How long did you know Mr. Albie C. Sansbury?

A. Well, 1933 up to date.

Q. Up to the time he died?

A. Up to the time he died, yes.

Q. Did you visit Mr. Sansbury at his home?

A. Yes, I was out on Oakland.

Q. Oakland?

A. Oakland, yes. I don't know just exactly the number.

Q. 4605—that the number, approximately?

A. It was out that way, yes.

Q. Did you visit him at any other place?

A. I used to go occasionally down to the river, down to his little home or farm down there.

Q. At 81st and Lyndale Avenue North and the river?

A. That's on the river bank, yes.

Q. How frequently did you visit him there?

A. Well, I couldn't say exactly how many times, but I was out there quite a few times. In fact, I stayed there a couple times over night. * * *

Q. Did he ever talk to you about his family?

A. Well, not very much.

Q. Well, did he ever talk to you about his marriage to Alice, his wife?

A. Well, he said something about the children. • • •

Q. What was said by Mr. Sansbury in that conversation?

Mr. Abdo: Just a moment. Will you fix time and place?

A. Well, this was out at the home on the river.

Mr. Abdo: About when was that?

A. Well, I couldn't say the exact date because I was out there quite a few times. I can't remember which date it was when we were talking about that.

Mr. Abdo: Give us an approximation of the year and the month.

A. It would be in 1938, I would judge.

Q. (By Mr. Melin) Was that when you stayed over night?

A. That time I stayed over night, yes.

Q. Just state what was said by Mr. Sansbury about his marriage to Alice, and what was said about the children that Alice had at the time of his marriage.

A. Well, he said that he would take care of the children just like his own."

• • • • •

"Q. (By Mr. Melin) Did he talk about how he was going to take care of any or all of these children?

A. Well, the way he said, he was going to take and divide it up. He said: 'I am not going to take this with me.' He wasn't going to take it with him, but was going to provide for each of them when he passed away.

Q. He said he was going to provide for each child?

A. That's right. • • •

Q. What children, if any, were mentioned?

A. He mentioned all of them."

Under the agreement involving Mr. Bushaw, the relationship between him and Mr. Sansbury as child and parent continued from 1907, when the agreement was made, until 1948, when Mr. Sansbury died.

The testimony of respondent Bushaw, by reference, is in substance and found in the record as follows:

He was a party to and heard the agreement testified to by witness Rempher between his mother and Albie C. Sansbury just after their marriage, the substance of which conversation had been stated and repeated to him at other times with reference to his status in the new family at the time of the marriage of his mother, Alice Hierlmier, to Mr. Albie C. Sansbury. He knew Albie C. Sansbury for about two years before aforesaid marriage. He also knew William Hart before his mother's marriage. He lived and served forthwith as a member of the family at the hotel where the marriage took place and became night clerk therein at the direction of Mr. Sansbury. He moved as a member of the family from the hotel in the spring of 1908. He was 15 years old at the time of aforesaid marriage. He went to school and in the summer worked in a mattress factory, bringing home his wages earned (R. 87-91). He moved and lived with and served as a member of the family, his parents, in 1909, to places having acreage. He at these places helped to cultivate a garden, raised chickens, kept a cow and horse. He drove Mr. Sansbury almost daily to and from work at the Milwaukee Railway Shops, 24th and Hiawatha, with horse and buggy. He also worked at Dan Patch Airline and at the Harwood Bag Factory while here, bringing home his wages. He in 1912 moved and lived with the family at Hutchinson, Minnesota, where Mr. Sansbury's railroad work required him to be for about a year, and here he worked learning the automobile trade. He returned with the family to Minneapolis and lived and worked as a member there at 2525 Cedar Avenue. He worked for Dan Patch Airline again and the Milwaukee Road, turning in his earnings to the family (R. 91-95). He was married in 1915 while living at 2444 Hiawatha Avenue and within a year took up his own residence in

Minneapolis, Minn., and continued to work for the Milwaukee Railroad, supporting his own family. He then moved with his own family to Margie, Minn., where he engaged in the logging and lumbering business, and remained there for a period of about ten years. Here Mr. and Mrs. Sansbury visited him (R. 95, 96). He, upon return to Minneapolis, lived at 4444 Third Ave. S. Then in 1931 he lived at 81st and Lyndale Ave. N., where he dismantled a large barn and built a cottage on the Sansbury three acres, receiving as compensation only his provisions for himself and family (R. 96-98). He lived thereafter at 1519 Fourth Ave. S. and 1805 Fifth Ave. S. for about three years with his family. Here Mr. Sansbury on wintery nights, to enable him to make his railroad runs, stayed with Bushaw on occasions over night since his home at 81st and Lyndale became impassable in bad weather. His home was broken up in 1936 since his wife became institutionalized and the furniture for his home was removed to Sansbury's home at 81st and Lyndale Ave. N., where it remained. He accompanied Mr. Sansbury when he purchased implements for his acreage at Lyndale and 81st. He helped cultivate the garden at 81st and Lyndale and during one year planted an acre of potatoes (R. 98-100). He visited Mr. Sansbury after his mother had died in March, 1947. He obtained a job as an engineer at the Francis Drake Hotel in the winter of 1947-1948 on the recommendation of Mr. Sansbury (R. 101, 102). Mr. Sansbury died April 26, 1948.

Under the agreement involving Mrs. McCarty, the relationship between her and Mr. Sansbury as child and parent continued from 1907, when the agreement was made, until 1948, when Mr. Sansbury died.

The testimony of respondent McCarty by reference in substance and found in the record is as follows:

She was a party to and heard the agreement testified to by

witness Mrs. Rempher between her mother and Albie C. Sansbury just after their marriage at the hotel, the substance of which conversation had been stated and repeated to her at other times with reference to her status in the new family at the time of the marriage of her mother, Alice Hierlmier, to Mr. Albie C. Sansbury. She had met Mr. Sansbury about two years before his marriage to her mother. She had met Mr. Hart prior to the marriage of Mr. Sansbury to her mother. She immediately upon the marriage, at the direction of Mr. Sansbury and his agreement with her aunt, Mrs. Rempher, in view of their not living in a private home but in a hotel, and until such place could be obtained, sent her with her aunt to Grand Forks, North Dakota, there to go to school, which she did, and returned in the spring of 1908 (R. 146, 147). When she returned to Minneapolis her parents were living in a private home. Here, besides doing work at home, she worked in a bakery and brought home her earnings to the family. She thereafter moved as a member of the family to places having acreage, namely, Rice Lake, and 4108 22nd Avenue South, both in Minneapolis. Here she did work about the home places, helped with the garden, and did housework. She also worked in the Harbor Bag Factory, and in an automobile shop, making parts, and brought home her earnings to the family. She, when speaking to Mr. Sansbury, called him "Dad," "Pa" and "Father" (R. 147-151). She, while living at 4108 22nd Ave. S., in the fall of 1910, married John McCarty from her home town, Medford, Wis. She was given a family wedding and thereupon moved to Wisconsin, where she lived until 1927. Here Mr. and Mrs. Sansbury visited her frequently. She visited them in Minneapolis three times. There were nine children of this marriage. She divorced her husband due to cruel and inhuman treatment and secured custody of the children. She and her family were brought to Minneapolis

by Mr. Sansbury in his automobile to his home at 4605 Oakland Avenue. Thereafter she found various places to live in Northeast Minneapolis and at the beginning of such residence, both Mr. and Mrs. Sansbury would stay with her over night to help her with her family (R. 152-155). She graduated as a beauty operator and soon made her living in that business for her family. She accommodated Mr. Sansbury during severe winter weather by allowing him to stay over night in her home on occasions. She helped Mr. and Mrs. Sansbury during the depression (R. 155-157). She went into partnership in the purchase of a home, 2507 Pierce St. N. E., Minneapolis, with her son-in-law, Norman Nelson, in 1943. Mr. Nelson was called into the Navy and upon his return therefrom his family had increased and he desired more room and a separate home for himself and bargained to have his half purchased from him by Mrs. McCarty for $1,000. The original purchase was financed by Mr. Sansbury. To secure this $1,000, application was made to FHA but due to the inadequacy of the security the loan was not made. The property was then offered for sale. Mr. Sansbury learned of the situation whereupon he made an agreement with Mrs. McCarty about it, and reference is made to Mr. Nelson's testimony in regard thereto.

Norman Nelson, son-in-law of respondent McCarty, testified that he made application to FHA for a loan on the house at 2507 Pierce St. N. E., Minneapolis, owned in common by himself and his mother-in-law, Mrs. McCarty, so as to obtain $1,000, the amount he had put into the house, but failed. Thereupon he put a sales sign upon the premises and employed a real estate agent to effect a sale. Mr. Sansbury saw the sign and made inquiry and learned that Mr. Nelson desired to secure $1,000, the amount of his investment in the place, to buy a home for his increasing family. Mr. Sansbury thereupon agreed with Mrs. McCarty that he would

furnish her with $1,000 so that she could pay Mr. Nelson the amount April 26, 1948. The agreement could not be consummated for Mr. Sansbury suddenly died during the forenoon of April 26, 1948 (R. 157-162).

Evidence Favorable to Respondents

While it is believed by petitioners that the summary of facts contains all that is essential to review the decision of the Supreme Court of Minnesota, petitioners, in fairness to this Court and also to respondents, call attention to some additional evidence which discloses that there were some conflicting issues of fact which might justify the jury and a Court, as triers of fact, with inferences favorable to respondents; also, that to draw the proper inferences the triers and not the review Court should weigh the evidence and pass upon the credibility of the witnesses. Respondents denied in their answers in the trial Court that petitioners had any claim upon the estate whatever, and offered some evidence to refute petitioners' claims of any share in the estate property.

Mrs. Rosemary L. Belk, who was a tenant of Mr. Sansbury for a short time before his demise, gave testimony in behalf of respondents, in part, as follows (R. 224-226):

"Q. While you were there did you ever see Ray Bushaw?

A. Yes. Twice.

Q. When was the first time that you saw him?

A. We had just finished eating dinner on Sunday when we noticed a black and white bike with somebody riding it come into the yard.

Q. About when was it?

A. Well, I can't say. It was in weather when you would be riding a bike, so it must have been after winter was over. It must have been the following spring after we had been there for the first winter.

Q. That is, the spring of 1948?

A. Yes.

Q. You saw him there on a bike?

A. Yes.

Q. Were you introduced to him at that time?

A. No, I wasn't. I told one of my children—

Mr. Melin: Just a minute. What you told is not responsive.

The Court: That's correct.

Q. (By Mr. Abdo) While this individual was there on the bike, did he have a conversation with Mr. Sansbury?

A. Yes.

Q. What was the conversation?

A. He said that is my wife's no-good son.

Q. Did you see Mr. Bushaw on another occasion?

A. Yes, I did.

* * * * *

Q. When was that?

A. On a Sunday morning.

Q. Can you state the approximate time?

A. We were going to 11:00 o'clock Mass, so I imagine it was about twenty minutes to. Somewhere thereabouts.

Mr. Melin: It is not specific as to time and date.

Q. (By Mr. Abdo) What month?

A. It must have been—well, it was after the first time. I couldn't remember just exactly how long afterwards.

Q. Can you give us an idea? Was it a month or two or three?

A. Oh, it must have been a couple months.

Q. A couple months after you saw him the first time?

A. Yes.

Q. Where did you see him?

A. In Mr. Sansbury's yard.

Q. Did you hear any conversation between them?

A. I did.

Q. What was the conversation?

A. I can't repeat the exact words.

Q. Give us the best of your recollection.

A. He said he didn't want him around there.

Q. Who said that?

A. Mr. Sansbury.

Q. Did he say anything else that you recall?

A. No.

Q. Did Mr. Bushaw say anything?

A. I didn't hear anything he said.

Q. Was the individual you saw at that time—is he in court here anywhere?

A. Yes, he is.

Q. Where?

A. In the second row of seats. The man with the gray hair.

Q. The man with the gray hair. Is he the man that was on the witness stand previously?

A. Yes.

Q. Is he the man they referred to in court as Mr. Bushaw?

A. He is.

Q. Did you ever have any conversation with Mr. Sansbury relating to finances or money?

A. Yes.

Q. When did you have such conversations?

A. At different times.

Q. When was the first time that you recall?

A. At lunch one day, I believe.

Q. What was said?

Mr. Melin: I move that the question be more specific as to time, day, month and year.

Q. (By Mr. Abdo) Give us the approximate time.

A. Well, I had my washing outside so I know it was summer. I had to wash that morning, and I always hung in the neighbor lady's basement in the winter. So I know it was nice weather. And he was only there one summer that he lived.

Q. That would be the summer of 1948?

A. Yes.

Q. What was the conversation?

A. We were speaking of wills. Another neighbor lady was present.

Q. Who was there?

A. Mrs. Robert Timons. She told him he should make a will. He said, oh, I am going to live to be a hundred. He didn't need a will. He said anything I have would go to my own—everything I have is Babe's. She is my only flesh and blood.

Q. When he used the word, "Babe," did you know whom he was referring to?

A. Yes, I did. He referred to her many times as "Babe."

The Court: The last part is stricken.

Q. (By Mr. Abdo) To whom was he referring?

A. Margueriette.

Q. Margueriette DeKarlo, one of the defendants here?

A. Yes."

Rebuttal testimony of Ray Franklin Bushaw denies he had ridden a bicycle in forty-five years; also denies the visits testified to by witness Belk (R. 109).

Cleon Charles Leach, who was a co-worker with Mr. Sansbury for many years, gave testimony in behalf of respondents in part as follows (R. 244, 245, 248):

"Q. Did you ever meet—prior to Mr. Sansbury's death—did you ever meet any members of his family?

A. Margueriette.

Q. One of the defendants here?

A. That's right. * * *

Q. Where did you meet her?

A. The first time I met her was when Mr. Sansbury was firing for me. She was a little girl, thirteen or fourteen years old. She was over to the house several times after.

Q. Your house?

A. Yes.

Q. Did you ever meet any of the other members of Mr. Sansbury's family?

A. No.

Q. Did you ever meet Mrs. Sansbury?

A. I never did.

Q. Did you ever see her?

A. No. * * *

Q. During the time you were with him, did he ever discuss any members of his family with you?

A. He never mentioned them.

Q. Did he ever mention any children that he had?

A. Never.

Q. At the time you met Margueriette, how was she introduced to you?

A. She came over to the house alone, see. She says: 'Mr. Sansbury is my dad. I am Margueriette,' or something like that.

Q. Mr. Sansbury had never previously mentioned her to you?

A. Oh, yes.

Q. He had mentioned Margueriette?

A. Yes. * * *

Q. What did he say about it?

A. I recall very distinctly that he said: 'She is my boy and her mother's girl.' * * *

Q. Did you ever visit the Sansbury home prior to Mr. Sansbury's death? * * *

A. I did not visit him. I visited his home. He was not at home. * * *

Q. Did you ever have a conversation with Mr. Sansbury regarding his financial status?

A. Money?

Q. Yes.

A. Yes.

Q. Do you recall when the last conversation of that sort was that you had with him?

A. Yes.

Q. About when was that?

A. Oh, possibly three or four or five years ago. * * *

Q. Do you recall the next time when you had a conversation of that sort?

A. Well, every trip, why, we would talk about something on that order. But the next time that I recall very distinctly was when he was counting his bonds and had his bank book out on the bed, see.

Q. When was this, about?

A. About a year and a half before he died.

Q. This was in Montevideo.

A. In Montevideo, yes.

Q. What was said?

A. I said—he wasn't feeling very well—I said, 'why don't you take the pension,' and he said, 'No. By working until—.' He mentioned the date. Another year. He would have acquired approximately twenty thousand

dollars, see. And that it would be pretty nice to leave the kid that much money.

Q. Did he tell you whom he meant by the kid?

A. Oh, yes. We were talking about Margueriette at the time out in Hollywood.

Q. Did you have any later conversation with him along those lines?

A. The other one I remember very distinctly was when he—I think it was after Mrs. Sansbury died, or maybe just before that, he received a letter from Hollywood in regard to some business venture that apparently his daughter was going into or something.

Q. When did this occur? You say shortly after Mrs. Sansbury died?

A. Either before or after. It was that year, see.

Q. Whereabouts was this?

A. In the box car.

Q. What was said?

A. And they wanted Albie to send some money for this business venture, and Albie asked me what I thought he should do. I told him he should get on a plane and go out and investigate and make a stay of about thirty days.

Q. From whom was the letter?

A. From Margueriette.

Q. Was anything else said at that time?

A. He said he couldn't afford that, but he guessed he would send the money because she would get it all some day. But, nevertheless, he figured on living for 25 or 30 years and it was nice to have it while he was alive."

Questions Presented

The questions herein presented by petitioners for review arose after the final decision of the Supreme Court of Minnesota, the highest Court in the State, which reversed favorable judgments for the petitioners in the trial court. Upon the rendition of such a decision, petitioners duly and timely petitioned for re-argument wherein was raised the federal question that said State Court decision abridged petitioners' rights guaranteed them under Section 1, Article 14 of the Amendment of the United States Constitution, to allow a petition for writ of certiorari:

I. Petitioners in their petition for reargument set out the following federal claim which was applicable to the whole of petitioners' petition for reargument and reversal of the decision of the highest State Court:

> "Respondents claim that the decision of this Honorable Court rendered March 16, 1951, reversing the final judgments of the trial court rendered in favor of respondents, nullified and held for naught the rights of the respondents under their contracts judicially established in the lower court which resulted in an abridgment of their rights and immunities as citizens of the United States and of the State of Minnesota in contravention of Section 1, Article 14, of the Amendments of the United States Constitution, and the decision of this Honorable Court under said Amendment, deprived respondents of their liberty and their property without the due process of law and denied to each of them within its jurisdiction the equal protection of the law" (R. 335).

By intendment of the petitioners as disclosed by their petition, petitioners were denied due process of law, as well as equal protection of the law under the aforesaid 14th Amendment by the highest State Court rejecting and nullifying the verdict of the jury, which was not challenged there by the appellants and was considered of no weight and benefit to petitioners by the highest State Court, in their opinion; the

Minnesota state statute governing trial by jury is herewith set out, which, by intendment and argument of want of due process and lack of equal protection, made under the aforesaid 14th Amendment, which violation rendered said statute invalid.

Sec. 546.03 of *1949 Minnesota General Statutes:*

> *"Issues, How Joined. Right to Jury Trial.*
>
> "Issues of law, unless referred as provided by statute relating to referee, shall be tried by the court. In action for recovery of money only, or specific real or personal property, or for a divorce on grounds of adultery, the issue of fact shall be tried by a jury, unless a jury trial be waived or a referee be ordered. All other issues of fact shall be tried by the court, subject to the right of the parties to consent or of the court to order that the whole issue or any specific question of fact involved therein be tried by a jury or a referee."

The intendment of the petitioners as disclosed by their petition to the highest State Court in their claim of lack of due process of law and equal protection of the law by the highest State Court involved and included the statute of Minnesota governing the adoption of children, is herewith set out, and was included by intendment and argument as falling within the 14th Amendment aforesaid, which statute, as applied, was rendered invalid under aforesaid decision.

Sec. 259.01, *Minnesota Statutes 1949:*

> *"Adoption; Petition and Consent.* Any resident of the state may petition the district court of the county in which he resides for leave to adopt any child not his own. If the petitioner be married the spouse shall join in the petition. All petitions for the adoption of a child who is a ward or pupil of the state public school shall be made jointly by the person desiring to adopt such child and the superintendent of the state public school. The director of social welfare may determine that the joinder of the superintendent in the petition shall be his consent to the adoption of the ward or pupil, as prayed for in the petition. A person of full age may be adopted."

Section 259.07:

"*Status of Adopted Child.* Upon adoption such child shall become the legal child of the persons adopting him and they shall become his legal parents with all the rights and duties between them of natural parents and legitimate child. By virtue of such adoption, he shall inherit from his adopting parents or their relatives the same as though he were the legitimate child of such parents and shall not owe his natural parents or their relatives any legal duty; and, in case of his death intestate, the adopting parents and their relatives shall inherit his estate as if they had been his parents and relatives in fact."

II. Whether, under the protecting provisions of the aforesaid Section 1, Article 14 of Amendments of the Federal Constitution, in each of petitioners' actions to recover for each a child's share in the estate of Albie C. Sansbury, deceased, under an oral agreement of adoption, at the commencement of said trials which were consolidated and tried together, petitioners and respondents before said trial agreed and consented that the question in the case, namely, whether the oral agreement alleged in petitioners' complaint was ever entered into, be submitted to a jury; and accordingly that question was submitted to a jury, which jury rendered a verdict in each of petitioners' cases that such an oral agreement had been made, which verdict was affirmed by the trial judge. Said verdicts were unchallenged on appeal from the trial court to the Supreme Court of Minnesota and the Supreme Court of Minnesota, in its decision, ruled that the verdicts of the jury were of no significance, yet reversed the judgments buttressed on said verdicts. The applicable decisions of this Court and the aforesaid 14th Amendment of the Federal Constitution as well as the State statute governing jury trials aforesaid, as applied, was rendered invalid, the rights of the petitioners by such decision were abridged and they were deprived of their rights thereunder.

III. Whether, under Section 1, Article 14 of the Amendments of the United States Constitution, in the actions by petitioners, adopted children of deceased against the administrator of the estate of Albie C. Sansbury, deceased, and another, also an adopted child of the deceased, for specific performance of the oral agreement of adoption after full completion thereof, each for a child's share in the estate of said deceased, was entered into on one side by the intestate, Albie C. Sansbury, and on the other side by petitioners and their mother, deceased; further that petitioners' mother only on consideration that said deceased Albie C. Sansbury would receive and adopt petitioners as his own children and become and be a natural father to petitioners, would she marry him; whereby and whereupon their marriage, petitioners were accepted and received into intestate's family and household and became members thereof as his natural children, and intestate became a natural father to petitioners and in all respects by virtue of such relationship there was present and grew and remained between them reciprocal obedience, service, society and affection. In reversing the judgments in the trial court wherein the estate had been divided into four equal parts decreeing defendant DeKarlo an equal share with each of the petitioners of said estate, the Supreme Court of Minnesota, the highest Court in the state, as a ground for said reversals, held that the evidence presented by petitioners was insufficient to sustain the judgments rendered in the trial court; however, the said Supreme Court held that the agreement involved was one for the making of a will and that the evidence was insufficient to support that kind of an agreement; while in fact, as disclosed by petitioners' pleading and issues made by the denial thereof by respondents, all the testimony in the record involves the establishment of the relation between Albie C. Sansbury and petitioners of that of parent and children under an oral agreement of adoption,

which decision by the highest State Court under the applicable decisions of this Court and under Section 1, Article 14 of Amendments of the Federal Constitution and the State statute aforesaid, as applied, governing the adoption of children, constituted an abridgment of petitioners' rights and a denial of due process of law and the equal protection of the law under the aforesaid statute and aforesaid 14th Amendment of the Federal Constitution.

Reasons Relied on for the Allowance of the Writ

Petitioners' actions are brought to enforce their rights to each of a child's interest in the estate of Albie C. Sansbury, deceased, against his administrator, R. R. Nelson, and another, also a child of deceased, to enforce an oral agreement for their adoption made by their mother and themselves on one side, and Albie C. Sansbury on the other, at the time of their mother's marriage to the decedent in 1907. The salient facts and circumstances of the matters involved are set forth in the "Summary Statement" above. The record discloses that petitioners' mother had been twice married, having had two children with the first marriage, and one child, Marvel Sansbury, with the second marriage, which children she obtained custody of when divorcing her two husbands. She was concerned over the welfare of these children. Upon her marriage to Albie C. Sansbury, the record discloses that she made it a consideration of her marriage to Albie C. Sansbury that he take her children as his own children and become a natural father to them and treat them as a natural father would. The evidence as a whole with inference fairly and reasonably arising therefrom was such as tended strongly, if not conclusively, to show that the agreement was made as aforesaid and that the petitioners became members of Albie C. Sansbury's family and household, and that the relationship of parent and children then commenced and con-

tinued with all the intimacies, society, service, love and affection of parent and children, which persisted until the death of Albie C. Sansbury April 26, 1948. In the trial to secure a child's interest in the estate before a jury and court, judgments were obtained decreeing each petitioner a child's interest in the estate of Albie C. Sansbury, he having died intestate. On appeal to the Supreme Court of Minnesota, the aforesaid judgments were reversed based on the theory that the aforesaid mentioned oral agreement was one to make a will in behalf of petitioners, and not to adopt petitioners, and said Supreme Court ruled that the evidence was insufficient to sustain the agreement to make a will, yet, however, failing to consider the agreement which the evidence discloses was actually made for the adoption of petitioners under the aforesaid oral agreement establishing the relationship of parent and children between Albie C. Sansbury and petitioners. Such ruling is erroneous and not in accord with the applicable decisions of this Court and is contrary to the provisions of the 14th Amendment of the Federal Constitution and in violation of the due process and equal protection clauses thereof, under which the State statute governing trial by jury was invalidated and the state statute governing adoption of children was invalidated, which decision nullified the rule that the evidence considered by a jury and a Court should be viewed in the light most favorable to the petitioners, giving them the benefit of every inference favorable to them that may be fairly and reasonably drawn from the evidence; that the credibility of the witnesses and the weight to be given to their testimony are for the trier of facts by jury and judge; and that if on the issue involved reasonable and fair-minded men may honestly draw this inference from the evidence, such issue is not one of law for the Supreme Court but one of fact for the jury and judge in the trial court.

It is undisputed that petitioners Muriel F. McCarty and Ray Franklin Bushaw were members as children of Albie C. Sansbury's family until each married, and the relation of parent and child was only broken by the death of Albie C. Sansbury. Petitioner Marvel Hierlmier remained single and lived at home and took the Sansbury's name.

The Supreme Court of Minnesota ruled that petitioners in effect were no more than employees and servants of Albie C. Sansbury, which ruling is in conflict with the applicable decisions of this Court and invalidates the State statute governing the adoption of children and is violative of Section 1, Article 14 of the Amendments of the Constitution of the United States.

The record discloses the background of Alice Ames Hierlmier and Albie C. Sansbury before and after their marriage, as well as the four children, including the petitioners and defendant Margueriette H. DeKarlo. Albie C. Sansbury at the time he courted Alice Ames Hierlmier was a sergeant in the National Army stationed at Fort Snelling, who on or about his marriage became an employee of the Chicago, Milwaukee & St. Paul Railway, and remained such an employee until he retired on a pension about a year before his death. The record discloses that Mrs. Sansbury purchased on time payments both of the homes which she and her husband and children lived in (R. 117-118). The inheritance she secured from her mother helped to pay for the homes and title thereto was held in joint tenancy, and she died March 21, 1947, leaving the title in Mr. Sansbury, who died intestate April 26, 1948. The record also discloses that petitioner Ray Franklin Bushaw dismantled a large barn and out of the lumber therefrom and additional lumber, built the first house on the Sun Kist acres at 79th Street on the Mississippi River, mentioned in the record.

The record discloses that defendant Margueriette H. DeKarlo came into the Sansbury home in 1916 as a ward of the State, she having been born out of wedlock, and was adopted through Court procedure in 1923. The record discloses that she was a child of Albie C. Sansbury with another woman. Mrs. Sansbury condescended to make her also a member of the Sansbury family and forgave the breach of the marriage vows by her husband, and could not have anticipated that she would claim to be the sole heir of Mr. Sansbury, by disinheriting the blood children of Mrs. Sansbury. Respondent Margueritte H. DeKarlo, after the death of both of the Sansburys, turned the tables on her adopted mother by claiming that her own step-brother and step-sisters, who had been orally adopted by Mr. Sansbury many years before, were now to become disinherited by Margueriette H. DeKarlo. She commenced probate proceedings within about a week after the death of Albie C. Sansbury, naming herself as sole heir to the estate of Albie C. Sansbury, who died intestate.

Petitioners have substantial rights to be protected and which are in jeopardy as well as involves the fructification of a long family life with the incident remunerations thereof which is attempted to be jeopardized by a late comer as a member of the family, who is conceded a child's share in petitioners' action, amounting to a frustration of this family entity that had its beginning in 1907 and lasted for more than forty-two years, as the Record discloses.

The record of the trial court reveals that the scales of justice was not unfairly weighed in arriving at the decision both by jury and judge. No unfair or inequitable agreement was attempted to be established. The intimate relationship of parent and children between petitioners and Albie C. Sansbury were proved. The Supreme Court of Minnesota failed in application and appreciation of the standards required by the Due Process clause and the Equal Protection of Law

clause of the aforesaid Amendment to petitioners. It cannot be reasonably claimed that one set of inferences rather than another can so easily be substituted, namely, the Supreme Court findings appeared readily to have been substituted for the finding of a jury and the findings of a trial judge in a trial that lasted for four days. The decision of the Supreme Court of Minnesota wholly failed to vindicate the public policy particularly involving establishing homes and parental supervision of children giving a fuller family life to both parent and child.

Petitioners' case constitute controversies of importance with respect to both legal and equitable principles. It involves the deep relationship of the human family as a unit in our society, living in one household in the relation of parent and children where the basis of filial love, service, society and affection between the children and their parents fostered and should be encouraged, and the record discloses that with the three petitioners in the family, Albie C. Sansbury and his wife, the mother of petitioners, lived a conjugal life which apparently was sustained by the family life including the petitioners, and it was only death that separated them. It is submitted that the evidence in the record discloses an unusual family life and it is the family that is all important in making for a corner stone in our constitutional edifice of democratic government in which the family is the smallest group unit.

The Supreme Court of Minnesota, in reversing the judgment of the trial court, violated petitioners' rights guaranteed them by Sec. 1, Article 14 of the Federal Constitution.

Wherefore, petitioners pray that their petition for rehearing herein of their petition for a writ of certiorari be considered and granted and thereupon petitioners be granted leave to file their petition for writ or certiorari herein and the same be issued by this Honorable Court in the herein entitled action to the Supreme Court of Minnesota, No. 35287, being the designated number of petitioners' cases in said State Court and be reviewed by this Court as provided by law, and upon such review said decision and judgment of said State Court be reversed and that Petitioners have such other relief as to the Court may seem appropriate.

February 18, 1952.

MURIEL F. MCCARTY,
RAY FRANKLIN BUSHAW AND
MARVEL SANSBURY,
By her Guardian ad Litem,
Petitioners.

E. LUTHER MELIN,
Counsel for Petitioners,
1301 Fourth Avenue South,
Minneapolis, Minnesota.

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 381

MURIEL F. McCARTY,

Petitioner,

RAY FRANKLIN BUSHAW,

Petitioner,

and

MARVEL SANSBURY, by MURIEL F. McCARTY, her Guardian ad Litem,

Petitioner,

vs.

R. R. NELSON, Administrator of the Estate of Albie C. Sansbury, and MARGUERIETTE H. DeKARLO,

Respondents.

BRIEF IN SUPPORT OF PETITION FOR RE-HEARING OF PETITION FOR LEAVE TO FILE PETITION FOR WRIT OF CERTIORARI AND FOR SUCH RELIEF AS TO THIS COURT MAY SEEM APPROPRIATE.

Opinions of the Court Below.

The opinion of the Supreme Court of Minnesota in the cases above entitled, which the petitioners here seek to have reviewed, is reported in 47 N. W. 2d 595, 233 Minn. 362, and appears on pages 272 to 280 of the Record filed herein.

Statement of the Case.

The essential facts of these cases are believed to be fully stated in the "Summary Statement" in Petitioners' Petition for a Re-hearing of Petitioners' Writ of Certiorari, and in the interest of brevity are not reported here.

Specifications of Error to Be Urged.

The Supreme Court of Minnesota in its opinion in said cases and in its denials of petitioners' Petition for Re-Hearing erred

1. In holding and deciding that the oral agreement in question was one to make a will in behalf of petitioners.

2. In not holding and deciding that the oral agreement was one for adoption of petitioners and was consummated.

3. In holding and deciding that the evidence was insufficient to support the judgments in favor of petitioners in the State trial court.

4. In reversing the judgments based on verdicts of the jury and findings of the trial judge obtained by petitioners in the State trial court.

5. In dismissing petitioners' Petition for Re-argument.

Summary of the Argument.

The evidence adduced at the trial of the aforesaid cases herein on the issue that each petitioner was entitled to a child's interest and share in the estate of Albie C. Sansbury, he having died intestate, under an oral agreement with him whereby petitioners were adopted as his children, was amply sufficient to support the judgments of the trial court decreeing each petitioner a child's interest, a one-quarter interest in the estate of Albie C. Sansbury. On appeal by respondents, the aforesaid judgments were reversed by the Supreme Court of Minnesota, the highest Court in the State, for the

reason that the evidence was insufficient to support the favorable judgments for the petitioners. Petitioners, after the aforesaid decision by the Supreme Court of Minnesota, duly made a petition for re-argument to said Court setting forth, among other grounds therein, the federal question that the aforesaid decision so rendered was violative of petitioners' rights guaranteed them under Article 1, Section 14 of the Amendments of the United States Constitution. The contentions of petitioners in their argument are rested upon the aforesaid Fourteenth Amendment of the Federal Constitution and authorities and cases cited in the argument in support thereof.

Argument.

These are actions brought in the District Court, Hennepin County, Minnesota, to enforce an oral agreement by which petitioners became members of the family of Albie C. Sansbury, deceased, and his natural children, and he became their natural father and would do by them what a natural father would do, an oral adoption by him of petitioners, made on or about the time their mother married Albie C. Sansbury in 1907, who thereafter lived a conjugal life until death separated them by the demise of Mrs. Sansbury, March 21, 1947, and the death of Mr. Sansbury followed on April 26, 1948. Defendant Margueriette H. DeKarlo was adopted by Mr. and Mrs. Sansbury by court procedure in 1923. The aforesaid children lived as members of Mr. Sansbury's family and in one household in the relationship of parent and children with reciprocal service, obedience, society, love and affection until they married, except for petitioner Marvel Sansbury who never married and lived as a member of the family until the home was broken up by the death of the parents, which affection, respect, regard and love between Albie C. Sansbury and the children, the petitioners, persisted until the death of

Albie C. Sansbury; evidence in support of which is disclosed in the "Summary Statement" herein.

Jurisdiction of this Court is sought under 28 U. S. C., Sec. 1257 (3).

In *Watts vs. Indiana*, 338 U. S. 49, at page 50, in the margin, it is stated:

> "While the state courts have the responsibility for securing the rudimentary requirements of a civilized order, in discharge of that responsibility there hangs over them the reviewing power of this court."

Petitioners are in this Court because the Supreme Court of Minnesota, the highest State Court, in its opinion, subverted their rights by its decision here challenged under Section 1, Article 14 of the Amendments of the Constitution of the United States.

The Court in the above cited case, at page 51, states:

> "But 'issue of fact' is a coat of many colors. It does not cover a conclusion drawn from uncontroverted happenings when that conclusion incorporates standards of conduct or critical judgment, which in themselves are decisive of constitutional right. Such standards and criteria measured against the requirements drawn from constitutional provisions and their proper application are issues for this court's adjudication. Hooven-Allison Co. vs. Evatt, 324 U. S. 652, 659, and cases cited. Especially in cases arising under the Due Process Clause, it is important to determine between issue of fact that are here foreclosed and issue of fact which, though cast in a form of determination of fact, are the very issues to review which this court sit. See Norris vs. Alabama, 294 U. S. 587, 589; Marsh vs. Alabama, 320 U. S. 50, 51."

In *Hooven-Allison Co. vs. Evatt*, 324 U. S. 652, 659, it is stated at page 659:

> "* * * the state court without specially finding some of the facts which we regard as of controlling significance, contented themselves with stating facts generally. The inference from these facts, that petitioner, techni-

cally, was but a purchaser of merchandise after it had been imported into this country. The conclusion, that petitioner was not importer and the fibre had ceased to be imports after sale to purchaser.

"In all cases coming to us from a state court, we pay great deference to its determination of facts. But when the existence of an asserted federal right or immunity depends on appraisal of independent facts of record or where reference to the fact is necessary to the determination of the precise meaning of the federal right or immunity as applied, we are free to examine the facts as well as the law in order to determine for ourselves whether the essential right or immunity is to be sustained. Kansas City S. R. Co. vs. Albers Commission Co., 223 U. S. 573, 591; Truax vs. Corrigan, 257 U. S. 312, 325; First National Bank vs. Kreford, 273 U. S. 548, 552, and cases cited. Fiske vs. Kansas, 274 U. S. 380, 385-386; Norris vs. Alabama, 294 U. S. 587, 589-590."

In *Herbert vs. Louisiana,* 272 U. S. 312, speaking of the effect and power of the 14th Amendment of the Federal Constitution, the Court states:

"What it does require is that state action whether through one agency or another shall be consistent with the fundamental principles of liberty and justice, which lie at the base of all our civil and political institutions and not infrequently are designated as the 'law of the land.' Those principles are applicable alike in all the states and do not depend or vary with local legislation. Costello vs. McConnico, 168 U. S. 674, 682-683; West vs. Louisiana, 194 U. S. 256, 261-267; Patterson vs. Colorado, 208 U. S. 454, 459; Pullman Co. vs. Knott, 235 U. S. 23, 25; Enterprise Irrigation District vs. Farmers Mutual Canal Co., 243 U. S. 157, 166."

The challenged decision of the highest State Court in depriving petitioners of their rights falls under the ban of the aforesaid decisions.

In *Crane vs. Hahlo,* 258 U. S. 142, 145, the Court, speaking of nature of contracts, said at page 145:

"It has long been settled by decision of this Court that

the word, 'contract,' in Sec. 10, Art. 1 of the Constitution, is used in its usual or popular sense as signifying an agreement of two or more minds upon sufficient consideration to do or not to do certain acts, mutual assent (express or implied) to its terms is of its very essence."

Judge Cardozo, in his opinion in *DeCicco vs. Schwerzer,* 221 New York 431, quoted at page 48 the above federal case and statement, and Judge Cardozo continued with reference to marriage contracts, at page 439, in the following language:

> "The conclusion to which we are thus led is reinforced by those considerations of public policy which cluster about contracts that touch the marriage relation. The law favors marriage settlements and seeks to uphold them. It puts them for many purposes in a class by themselves. (Phalen vs. U. S. Trust Co., 186 N. Y. 178, 181.) It has inforced them at times when consideration, if present at all, has been dependent upon doubtful inferences. (McNutt vs. McNutt, 116 Ind. 545; Appleby vs. Appleby, 100 Minn. 408.) It strains, if need be, to the utmost the interpretation of equivocal words and conduct in the effort to hold men to the honorable fulfillment of engagements designed to influence in their deepest relations the lives of others."

Petitioners' actions were brought to secure their own shares in the estate of the intestate, Albie C. Sansbury, and before another adopted child consummated her action to acquire for herself the whole estate of the intestate, and yet the actions could not have been brought earlier since the vested rights of petitioners as heirs arose only after the death of Albie C. Sansbury, their ancestor under the agreement establishing the relation of father and children between him and petitioners. *Jefferson vs. Fink,* 247 U. S. 288.

The refusal of the highest Court of the State to sustain and enforce petitioners' agreement in question constituted a denial to them of the equal protection of the laws contrary to the 14th Amendment of the Constitution. *Shelley vs. Kraemer,* 334 U. S. 1.

In *Wilkerson vs. McCarthy*, 336 U. S. 53, 70-71, the reasons given for taking jurisdiction under a writ of certiorari is stated in the following language at page 70:

> "The criterion governing the exercise of our discretion in granting or denying certiorari is not who loses below, but whether in passing on disputed questions of fact and in drawing inferences from proven facts the function of the trier of facts has been respected."

In *Aiken vs. Wisconsin*, 195 U. S. 194, 206, the Court, speaking of trier of facts, said:

> "But it must be assumed that the constitutional tribunal does its duty and finds facts only because they are proved."

Federal rights are denied as well by refusal of the State Court to decide questions presented as by erroneous decision of them. *Lawrence vs. State Tax Commission*, 286 U. S. 276, 282.

Whether the federal right set up in the State Court was denied or not given due recognition is a question on which claimants are entitled to invoke the jurisdiction of this Court on certiorari. It is the province of this Court to inquire not only whether the right was denied in direct terms, but also whether it was denied in substance and effect by interposing a non-federal ground of decision having no fair support. The record discloses the findings of the appellate court that the evidence was insufficient to support an oral contract to make a will, when the record discloses the fact that the oral contract in question was one of adoption of petitioners by the intestate. *Ancient Egyptian Arabic Order of Nobles of the Mystic Shrine vs. Michaux, et al*, 279 U. S. 737.

When the decision of a State Supreme Court, due to error in applying the Federal Constitution, leaves unanswered a question of State law that may be determinative of the case, the Court vacates the judgment and remands the case for further proceedings. *Clark vs. Williams*, 292 U. S. 112.

The highest Court of the State of Minnesota substituted its judgment for that of the jury and for that of the trial judge, both of which heard the witnesses and saw them while testifying and were solely qualified to pass on the credibility of the witnesses and the weight of the evidence of all of the witnesses.

The rule has been announced, if the error in a decision is gross and obvious, coming close to the boundary of arbitrary action, there may be a violation of the federal constitutional guarantees. *Patterson vs. Colorado,* 205 U. S. 454.

The syllabus of the case, in the language of the Court, omits controlling issues governing:

> "1. In a suit for specific performance of an oral contract to make a will disposing of property or to adopt a child, the contract must be proved by clear, positive, and convincing evidence, and it must be definite and certain in its terms. The burden is upon the plaintiff to show by full and satisfactory proof the fact of the contract and its terms before specific performance may be granted.
>
> "2. Evidence examined in plaintiffs' separate actions for specific performance of alleged oral contract to devise and bequeath real and personal property owned by stepfather at the time of his death and *held* insufficient to sustain finding of trial court that such agreement was made" (R. 272, 328).

The opinion of the highest Court of the State demonstrates that it completely failed to consider the oral agreement for adoption and the evidence in support thereof made at time of marriage of Mr. and Mrs. Sansbury and the taking into the family the wife's three children by the husband as his natural children, and he to become and be their natural father, who would do by them what a natural father would.

The petitioners could not have raised their federal question before their petition for re-hearing but this did not preclude the highest Court of the State to consider the federal right

raised therein instead of a dismissal without opinion. *Vandalia Ry. Co. vs. Indiana,* 207 U. S. 357, 367.

If the language used discloses intendment to raise federal questions in the one seeking writ of certiorari, that will be sufficient. No particular form of words is essential. It is only necessary that the federal claim and the ground therefor be brought to the attention of the State Court and if the record as a whole shows a clear intendment that this was done, consideration thereof will be had. *Dewey vs. Des Moines,* 173 U. S. 193, 199; *Bryant vs. Zimmerman,* 278 U. S. 63, 67; *St. Louis I. N. Sory Co. vs. Starboard,* 243 U. S. 592, 598; *Dahnke-Walker Co. vs. Bondyrant,* 257 U. S. 282. The section, 28 U. S. C. 1257 (3), authorizes the Supreme Court of the United States to review by certiorari decisions in State Courts where any right, title, privilege or immunity is specially set up or claimed under the Federal Constitution, treaties or statutes or under a commission held or authority exercised under the United States. The phrases, "drawn in question" and "specially set up and claimed," usually spoken of as sufficient to have "properly presented" or "properly raised," have come to be interpreted as having no separate meaning but in fact are considered synonymous so far as raising the federal question. Whether a federal question was sufficiently and properly raised in the State Court is itself a federal question in the decision of which the Supreme Court is not concluded by the view of the highest State Court. *Honeyman vs. Hanan,* 300 U. S. 14, 18; *Boyd vs. Thayer,* 143 U. S. 135, 180; *Davis vs. Wechsler,* 263 U. S. 22, 24; *Radio Station WOW, Inc., vs. Johnson,* 329 U. S. 120, 127-129. The rule which, in effect, attempts to raise a federal question in a petition for re-hearing, yields, of course, to the governing principle that the State practice must afford a litigant an opportunity to have the claimed federal right heard and determined and that even if the Court refuses

to pass upon the question, the raising will be timely if the question is advanced at the earliest opportunity. The federal question of petitioners was brought into the case by an unexpected decision of the highest State Court against them and petitioner had no prior opportunity to assert the claimed federal right or immunity, and as and when made was timely and legal. *Brinkeihoff-Farmer Trust Co. vs. Hill,* 281 U. S. 673, 677, 678; *California vs. Arkansas,* 338 U. S. 345. The decision of the highest State Court could not reasonably have been anticipated. In fact, it came as a surprise in view of the evidence in the record and the law governing, and the favorable verdict of the jury and the favorable findings, conclusions and memorandum of the trial judge.

Petitioners have substantial rights to be protected and which are in jeopardy as well as involves the justification of a long family life with the incident remunerations thereof which is attempted to be jeopardized by a late comer as a member of the family, amounting to a frustration of this family entity that had its beginning in 1907 and lasted for more than 42 years, as the record discloses.

This Court will pass upon the constitutional question although not properly presented by the record if there is also present some other ground upon which the case may be disposed of. This rule has found most varied applications.

A State Court cannot, by omitting to pass upon evidence or to make findings of fact, deprive a litigant of the benefit of a federal right; and it is the duty of the Supreme Court in the absence of findings, to examine the evidence to determine what facts might reasonably be found therefrom which would furnish a basis for the asserted federal right. *Carlson vs. Curtis,* 234 U. S. 103, 106; *Merchants Natl. Bank vs. Richmond,* 256 U. S. 635, 638; *Brooklyn Savings Bank vs. O'Neil,* 324 U. S. 697, 703.

If the State Supreme Court makes no findings of fact, but reverses the decision of the State trial court, which has found the facts with the same force and effect as the verdict of a jury, on the ground that plaintiffs' case was legally insufficient under the federal statute, it is the duty of the Supreme Court to determine for itself whether the facts found by the trial court justified recovery under the federal law. If so, there is a further inquiry whether there was substantial evidence to support these findings. *Jones Natl. Bank vs. Yates*, 240 U. S. 541, 552, 553.

Obviously, the exception under which the Supreme Court of the United States may analyze the facts in order to determine whether that which purports to be a finding of fact is so interwoven with the question of law as to be in substance a decision of the latter will be especially applicable in cases where the State Court makes a general or ultimate conclusion of facts. *Norfolk & Western Ry. vs. West Virginia*, 236 U. S. 605, 609-610.

Where the existence of the alleged federal question itself depends upon a finding of fact, the Supreme Court of the United States will examine the facts to see whether the evidence adequately sustains the finding. *King vs. Putnam Invest. Co.*, 248 U. S. 23; *Truax vs. Corrigan*, 257 U. S. 312-324; *Davis vs. Wechsler*, 263 U. S. 22, 24; *Treichler vs. Wisconsin*, 338 U. S. 251, 252.

The Supreme Court will review the findings of fact by a State Court when the federal right has been denied as the result of a finding shown by the record to be without evidence to support it; or where a conclusion of law as to a federal right and a finding of fact are so intermingled as to make it necessary in order to pass upon the federal question to analyze the facts. *Fisk vs. Kansas*, 274 U. S. 380, 385-386; *United Gas Public Service vs. Texas*, 303 U. S. 123, 148; *Aetna Life Ins. Co. vs. Duncan*, 266 U. S. 389, 394.

The Supreme Court, however, is not concluded by State Court's designation of an issue as a mere question of fact, when the matter decided was not the finding upon a disputed question of fact but a conclusion bearing upon the construction of a statute. *Acme Hawesler Co. vs. Burken Lumber Co.*, 222 U. S. 300, 305, 306. Similarly, State Courts cannot avoid review by Supreme Court of the United States of their disposition of the constitutional claim by casting it in the form of an unreviewable finding of fact. *Williams vs. North Carolina*, 325 U. S. 226; see *Norfolk & Western Ry. Co. vs. Maxwell*, 298 U. S. 682; *Chicago & Allan Ry. Co. vs. Wiggins Ferry Co.*, 119 U. S. 615, 622, 623; *Davis vs. Wechsler*, 263 U. S. 22, 24.

If facts alleged setting forth federal right are demurred to and the State Court sustains the demurrer and the case proceeds to judgment, otherwise of the pleading, the Supreme Court is at full liberty to consider the facts alleged as were the State Supreme Court in order to determine the legal effect as a deprivation of the federal right specially set up and claimed. *Boyd vs. Thayer*, 145 U. S. 135, 180; *Truax vs. Corrigan*, 257 U. S. 312, 324; *Postal Telegraph Cable Co. vs. Newport, Kentucky*, 247 U. S. 464. The federal right cannot be defeated by the form of local practice and we cannot accept as final a State Court's interpretation of allegations in the complaint asserting it. *Brown vs. Western Ry.*, 338 U. S. 294, 296. A determination by a State Court jury that a confession is voluntary is not conclusive upon the Supreme Court when the independent facts show that as a matter of constitutional law it was involuntary. *Chambers vs. Florida*, 309 U. S. 227, 228-229; *Ward vs. Texas*, 360 U. S. 547, 550; *Ashcraft vs. Tennessee*, 322 U. S. 143, 148; *Malenskie vs. New York*, 334 U. S. 401, 404; *Haley vs. Ohio*, 332 U. S. 596, 599.

The decision of the Supreme Court of Minnesota in nulli-

fying an independent verdict on one question of fact, which was not questioned by the respondents coincident with the nullifying of the findings of fact and conclusions of law of the trial judge surrounding the unchallenged verdict of the jury was a construction of the applicable law, the effect of which violated petitioners' rights to due process of law and equal protection of the law guaranteed them under the 14th Amendment of the Federal Constitution.

The 7th Amendment of the Federal Constitution provides in part that:

> "No fact tried by a jury shall otherwise be examined in any court of the United States than according to the rule of the common law."

This amendment has been held to apply to review by the Supreme Court of the United States of the verdict of State Court juries. *Maxwell vs. Dow*, 176 U. S. 581, 598; *Chicago B. & I. R. Co. vs. Chicago*, 166 U. S. 226, 242-246. Concurring opinion, Justice Black, in *United Gas Public Service vs. Texas*, 303 U. S. 123, 152-153; *Dower vs. Richard*, 157 U. S. 658, 667; see also *Termanullo vs. Chicago*, 337 U. S. 1; *Stromberg vs. California*, 283 U. S. 359.

Petitioners, under the aforesaid cases and the aforesaid amendment, had a right under the 14th Amendment aforesaid, to have the verdict of the jury respected by the highest State Court. The jury, the record discloses, was chosen by agreement and consent of both petitioners and respondents to decide the question of fact whether the oral agreement for the adoption of petitioners was actually made, and the jury answer was that such an agreement had been made in each of petitioners' cases.

The appraisal of the veracity and effect of witnesses lies with the trier of facts, whether judge or jury, or both.

Yutterman vs. Sternberg, 86 F. (2d) 321, 111 A. L. R. 736, speaking of trial facts, the Court said, at page 324:

"His was the lawful privilege of taking into consideration the manner and appearance of the witnesses on the stand; their way of testifying; the probability or improbability of the testimony which they gave; their respective opportunities to see and hear the things about which they gave testimony; and their apparent capacity and willingness to truthfully and accurately relate what they saw and heard. He could consider the contradictions, errors, and improbabilities in the situation as detailed, and the kinship and business relations of the witnesses, and doing all these things, which were among his legal rights, reach the truth if he could."

The Court also resorted to a State decision of Missouri and adopted its language, prefacing the same by the following remark:

"* * * Creamer vs. Bivert, 214 Mo. 473, loc. cit. 479, 113 S. W. 1118, 1120, the reasons back of the rule, thus: 'The bulk of the testimony was oral. In such condition of things, while this court has said over and over again that the whole record must come here in equity cases, so that (sitting as the final arbiter in chancery) we may weigh and decide de novo and thus do equity, yet the court is also fond of saying that deference should be given to the trial chancellor. He sees and hears much we cannot see and hear. We well know there are things of pith that cannot be preserved in or shown by the written page of a bill of exceptions. Truth does not always stalk boldly forth naked, but modest withal, in a printed abstract in a court of last resort. She oft hides in nooks and crannies visible only to the mind's eye of the judge who tries the case. To him appears the furtive glance, the blush of conscious shame, the hesitation, the sincere or the flippant or sneering tone, the heat, the calmness, the yawn, the sign, the candor or lack of it, the scant or full realization of the solemnity of an oath, the carriage and mien. The brazen face of the liar, the glibness of the schooled witness in reciting a lesson, or the itching over-eagerness of the swift witness, as well as honest face of the truthful one, are alone seen by him. In short, one witness may give testimony that reads in print, here, as if falling from

the lips of an angel of light, and yet not a soul who heard it, nisi, believed a word of it; and another witness may testify so that it reads brokenly and obscurely in print, and yet there was that about the witness that carried conviction of truth to every soul who heard him testify. Therefore, where an issue in equity rests alone on the credibility of witnesses, the upper court may with entire propriety rest somewhat on the superior advantage of the lower court in determining a fact.'"

In the case entitled *Lavender, Administrator, vs. Kurn, et al,* 327 U. S. 645, this Court said, in part, at pages 646-647:

"Following a trial in the Circuit Court of the City of St. Louis, Missouri, the jury returned a verdict in favor of petitioner and awarded damages in the amount of $30,000. Judgment was entered accordingly. On appeal, however, the Supreme Court of Missouri reversed the judgment, holding that there was no substantial evidence of negligence to support the submission of the case to the jury. 354 Mo. 196, 189 S. W. 2d 253. We granted a certiorari to review the propriety of the Supreme Court's action under the circumstances of this case."

Near the conclusion, after having discussed the case at pages 652 and 653, this Court further said:

"It is true that there is evidence tending to show that it was physically and mathematically impossible for the hook to strike Haney. And there are facts from which it might reasonably be inferred that Haney was murdered. But such evidence has become irrelevant upon appeal, there being a reasonable basis in the record for inferring that the hook struck Haney. The jury having made that inference, the respondents were not free to relitigate the factual dispute in a reviewing court. Under these circumstances it would be an undue invasion of the jury's historic function for an appellate court to weigh the conflicting evidence, judge the credibility of witnesses and arrive at a conclusion opposite from the one reached by the jury. (Citations omitted.) It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different infer-

ences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable. We are unable, therefore, to sanction a reversal of the jury's verdict against Frisco's trustees."

The solemn verdict of a jury of 12 citizens after four days' attendance in the trial of this case is treated with scant regard by the Supreme Court; yet, it has brushed aside the verdict of the jury as insignificant judicial procedure, yet the Court finds that the jury verdict formed the basis of the trial judge's findings. Moreover, the verdict is not challenged by the appellants. Set out below is a part of the opinion in reference to the status of the jury verdict in this case which is violative of petitioners' rights guaranteed them by the 14th Amendment of the Federal Constitution, as well as state statutes governing jury trials:

"The trial court's other related findings of fact and its conclusions of law granting specific performance, awarding each plaintiff an undivided one-quarter interest in the assets of said estate and other relief, likewise were predicated upon the jury's special verdict in each case.

"On appeal, defendants contend that the trial court's finding No. XXII, above quoted, and its other related findings, its conclusions of law therefrom and order for judgment for plaintiffs are not justified by the evidence and are contrary to law. At the oral argument, defendants' counsel conceded that the evidence was sufficient to support the special verdict of the jury in each case,

i.e., that Albie C. Sansbury agreed to consider and treat plaintiffs as his own children, but maintained that the trial court's findings are not justified by the evidence and that the special verdict of the jury does not support the lower court's decision" (R. 277).

"The special verdict of the jury, which was adopted by the trial court, merely established that Mr. Sansbury agreed that the relationship of natural father and child should exist between himself and the plaintiffs. It established the fact that Mr. Sansbury promised and agreed to treat and consider the children as if they were his own. That is neither an agreement nor a promise that at his death he would give and leave them his property. Even a natural child has no assurance of a vested inheritance. He may be cut off without a cent. He is not the born or created promisee of property. Clearly, the expressed intention and agreement of Mr. Sansbury to treat plaintiffs as his own children was only a normal development following his marriage to their mother, and the understandable desire of a stepfather to get along harmoniously in the atmosphere which marriages of this kind frequently engender.

"What the evidence shows that plaintiffs did, young as they were while living in the Sansbury household, was nothing more than normally would be expected of children under the same and similar circumstances. What they did they normally would be expected to do for their own mother while living in her home and what any stepchild would do for a stepfather who permitted such child to remain in his home and whom he promised to treat as his own child. There is nothing in what Mr. Sansbury said or what the plaintiffs did from which it can be inferred that a binding contractual arrangement such as that alleged by plaintiffs and found by the trial court was effected" (R. 279, 280).

The Supreme Court of Minnesota was in error in holding that the evidence was insufficient to support the agreement establishing the relation of parent and children between intestate Albie C. Sansbury and the petitioners below;

The syllabus of this case is composed of two paragraphs

and the only reference to the agreement of parent and child in question consists of five words; namely: "or to adopt a child." The opinion in paragraph 1 of the Syllabus discloses that the agreement involving the adoption of petitioners was abandoned and the Supreme Court of Minnesota rested its decision instead upon paragraph 2 of the Syllabus, an agreement between intestate and petitioners to make a will devising one-quarter interest of his estate to each of the petitioners. The only reason the expression, "one-quarter interest," was used is due to the fact that the petitioners conceded a child's interest to respondent DeKarlo, which would divide the estate into four parts. Excerpts of the opinion, including the Syllabus and paragraph 1 of the Opinion, is set out below. This Opinion is violative of petitioners' rights guaranteed them under the 14th Amendment of the Federal Constitution and state statutes governing adoption of children:

"SYLLABUS

"1. In a suit for specific performance of an oral contract to make a will disposing of property or to adopt a child, the contract must be proved by clear, positive, and convincing evidence, and it must be definite and certain in its terms. The burden is upon th plaintiff to show by full and satisfactory proof the fact of the contract and its terms before specific performance may be granted.

"2. Evidence examined in plaintiffs' separate actions for specific performance of alleged oral contract to devise and bequeath real and personal property owned by stepfather at the time of his death and *held* insufficient to sustain finding of trial court that such agreement was made."

OPINION

"1. It is well settled in this State that a person may by oral contract bind himself to give his property to certain designated persons at his death, and that such con-

> tract may, under certain circumstances, be specifically enforced. * * * The terms of the contract, however, must be so definite and certain as to leave no doubt as to its meaning. * * * Morover, the burden is upon plaintiff to prove the fact of the contract and its terms by clear, positive, and convincing evidence before specific performance may be granted."

The confusion of the Supreme Court in dealing with the issues in this case involving the establishment of the relation of parent and children between the intestate Albie C. Sansbury, and the petitioners under a proved oral agreement establishing that status, is manifest. The Court failed woefully to scrutinize the salient points in the evidence and wholly overlooked material evidence, as well as distorted some very important evidence. It formulated in its opinion a fictitious basis by distorting plain evidence into meaning something that the plain words used deny, thereby forming the basis for the conclusion that was arrived at in the opinion. A portion of the opinion indicative of the statement above is set out below, which opinion is violative of petitioners' rights guaranteed them under the 14th Amendment of the Federal Constitution:

> "2. In the instant case, it appears that the only direct promise Mr. Sansbury ever made to plaintiffs was during the conversation around the family dinner table at the Garfield Hotel when Mrs. Rempher, Mrs. Sansbury, Mr. Sansbury, and the children were talking about getting 'a farm and * * * a home away from that hotel,' because 'It wasn't the place for children,' and Mr. Sansbury 'spoke up' and said 'to Muriel and Ray and all of us,' 'If you kids do your part, why, *I will do my best as a father to you children and go out on this place* [farm].' The record discloses that Mr. Sansbury kept his promise and did provide a home and small acreage in the 'farming districts' then in the City of Minneapolis, and that plaintiffs in turn did their part by raising a garden, taking care of a horse, a cow, tending chickens, and doing other household duties.

"All the other evidence offered by plaintiffs in support of the alleged contract consisted merely of statements made by Mr. Sansbury, not to plaintiffs, but only to Mrs. Rempher and Mr. Frenzel. Mr. Sansbury told Mrs. Rempher that 'he was taking these children and going to do the best by them that he could.' He also said to Mrs. Rempher, 'I have agreed to take these three children as my own children and treat them as a natural parent would.' In 1938, Mr. Sansbury told Mr. Frenzel that 'he would take care of the children just like his own' and that he 'was going to provide for each of them when he passed away.' However, there was no mention of a will. Viewing the testimony of Mrs. Rempher and Mr. Frenzel in its most favorable light for plaintiffs, it does not constitute clear, positive, and convincing evidence that Mr. Sansbury ever promised or agreed that upon his death he would give and leave to each of the plaintiffs a one-quarter interest in all the property, real and personal, of which he might die seized and possessed, as alleged by plaintiffs and found by the trial court. Furthermore, it does not prove that Mr. Sansbury ever promised or agreed to adopt plaintiffs or that he promised or agreed to leave them anything upon his death. There was no offer or acceptance of such a contract. There was no promise or agreement to that effect. There was no promise or agreement on Mr. Sansbury's part that he would make any provision for plaintiffs by will or otherwise when he died. The most that can be said from the evidence in this respect is that Mr. Sansbury expressed plans for future action in which each of the plaintiffs might be considered favorably. However, proof of a mere expression of intention is not proof of a contract" (R. 278-279).

The Supreme Court of Minnesota was in grave error in holding that the evidence in the case was insufficient to sustain the judgments of the trial court and thereby violated petitioners' rights guaranteed them under Section 1, Article 14 of the Amendments to the Federal Constitution.

Petitioners therefore pray that this Court will consider this Petition for Re-Hearing of Petitioners' Petition for a Writ of Certiorari herein and upon consideration thereof grant petitioners leave to file their Petition for Writ of Certiorari and that same be issued by this Court directed to the Supreme Court of Minnesota to the end that the decision of the Supreme Court of Minnesota, No. 35287, wherein petitioners are named respondents and respondents are named appellants, be reviewed by this Court as provided by law, and that upon such review said decision be reversed and the petitioners have such other relief as this Court may deem appropriate.

Dated February 18, 1952.

MURIEL F. MCCARTY,
RAY FRANKLIN BUSHAW,
MARVEL SANSBURY,
By her Guardian ad Litem,
Petitioners.

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